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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1937

No. 779

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

PHILIP L. GERHARDT

No. 780

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VR.

BILLINGS WILSON

No. 781

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

V8.

JOHN J. MULCAHY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1988 CERTIORARI GRANTED FEBRUARY 28, 1988

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SUPREME COURT OF THE UNITED STATES

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VS.

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No. 781

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vs.

JOHN J. MULCAHY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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Before United States Board of Tax Appeals

Docket No. 77375

PHILIP L. GERHARDT, Petitioner

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket entries

Appearances: For Taxpayer: Julius Henry Cohen, Austin J. Tobin, Esq., Wilbur La Roe, Jr., Esq. For Comm'r: Walter W. Kerr, Esq., John D. Kiley, Esq., Francis H. Urell, Esq., Geo. D. Brabson, Esq.

1934

Sept. 19—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 19—Copy of petition served on General Counsel.

Nov. 14—Answer filed by General Counsel.

Nov 21-Copy of answer served on taxpayer.

1935

Aug. 16—Motion for circuit hearing at New York City filed by General Counsel.

Aug. 19—Hearing set Sept. 4, 1935, on motion.

Sept. 4—Hearing had before Mr. Trammell on motion for circuit hearing. Granted.

Sept. 4—Order granting motion and placing on the N. Y. C. Circuit Calendar, entered.

Dec. 24—Hearing set for week of 2/3/36 in New York, N. Y.

2 1936

Feb. 3—Hearing had before Mr. Sternhagen, Div. 10 on merits. Submitted. Motion to consol. with 75916-77375-77 incl. and 80769 granted. Cont'd from 2/3/36 to 2/4/36, to 2/6/36. Appearances of Austin J. Tobin & Wilbur La Roe, Jr., Esqs. filed at hearing. Stipulation of facts filed and exhibits filed. Original brief of petitioner filed. Reply to Commissioner's brief due 4/22/36. Commissioner's brief due 3/23/36.

Feb. 21—Transcript of hearings Feb. 3/4/5/6, 1936, filed.

Mar. 23—Brief filed by General Counsel. 4/15/36 copies received.

Apr. 11-Reply brief filed by taxpayer. 4/11/36 copy served.

Apr. 11—Proposed Findings of Fact filed by taxpayer. 4/11/36 copy served.

Apr. 24—Motion to correct errors in respondent's brief filed by General Counsel. 4/27/36 Granted.

Apr. 25—Motion for leave to file memorandum reply brief, reply brief lodged, filed by General Counsel. 4/27/36 Granted.

July 28—Motion to correct transcript filed by taxpayer 7/29/36 Granted.

Oct. 28—Findings of fact and opinion rendered, Mr. Sternhagen,
Div. 10. Judgment will be entered for the petitioner.
Oct. 31—Judgment entered, Div. 10. Mr. Sternhagen.

Nov. 20—Motion to amend findings of fact and for specific findings of fact filed by General Counsel. 11/21/36 copy served.

Nov. 27-Motion to vacate decision and reconsider opinion filed by General Counsel, Copy served 11/28/36.

Dec. 22—Motion to deny motion filed on Nov. 20, 1936, filed by taxpayer. 12/24/36 copy served.

Dec. 22—Motion to deny motion filed on Nov. 27, 1936, filed by taxpayer. 12/24/36 copy served.

Dec. 23—Order denying motion to amend findings, entered. Dec. 23—Order denying motion for consideration, entered.

1937

Jan. 25—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filedby General Counsel.

Feb. 1-Proof of service filed by General Counsel.

Mar. 15—Motion for extension to June 25, 1937, to complete and transmit record, filed by General Counsel.

Mar. 15—Order enlarging time to June 25, 1937, to prepare and deliver record, entered.

Apr. 12—Stipulation for review by the United States Circuit Court of Appeals, 2nd Circuit, filed.

June 23—Motion for extension to Sept. 1, 1937, to complete and transmit record, filed by General Counsel.

4. 1937

June 23—Order enlarging time to 9/1/37 to prepare and deliver record, entered.

July 2-Praecipe with proof of service thereon filed.

July 2-Agreed statement of evidence lodged.

July 2—Stipulation to consolidate as a single record and to print statement of evidence but once filed.

July 16—Copy of order from 2nd Circuit, consolidating appeals as a single record and taking printed statement of evidence but once for all cases and transmitting all exhibits in physical form, filed.

July 23-Agreed statement approved and ordered filed.

Before United States Board of Tax Appeals

Docket No. 77377

BILLINGS WILSON, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Julius Henry Cohen, Austin J. Tobin, Esq., Wilbur LaRoe, Esq. For Com'r: John D. Kiley, Esq., Geo. D. Brabson, Francis H. Urell, Walter W. Kerr, Esq.

5 1934

Sept. 19—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 19—Copy of petition served on General Counsel.

Nov. 14—Answer filed by General Counsel. Nov. 21—Copy of answer served on taxpayer.

Dec. 24—Hearing set for week of 2/3/36, New York.

1936

Feb. 3—Hearing had before Mr. Sternhagen, Div. 10, on merits. Submitted. Motion to consol. with 77375-76, 75816, and 80769, granted. Heard 2/3/36-2/4/36-2/5/36 & 2/6/36. Appearances of Austin J. Tobin & Wilbur La Roe, Jr., Esqs. Stipulation of Facts & Exhibits filed. Original brief of petitioner's filed. Commissioner's brief due 3/23/36. Reply and respondent's brief due 4/22/36.

Feb. 21—Transcripts (4) of hearings of Feb. 3-4-5-6, 1936, filed. Mar. 23—Brief filed by General Counsel. 4/15/36—16 copies received.

Apr. 11-Reply brief filed by taxpayer.

Apr. 11-Proposed findings of facts filed by taxpayer.

Apr. 24—Motion to correct errors in respondent's brief filed by General Counsel. 4/27/36 Granted.

Apr. 25—Motion for leave to file reply brief filed by General Counsel. Reply brief lodged.

Apr. 27—Motion to file reply brief granted—ordered filed and served.

6 1936

July 28—Motion to correct transcript filed by taxpayer 7/29/36 Granted.

Oct. 28—Findings of fact and opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered for the petitioner.

Oct. 31-Judgment entered, Div. 10. Mr. Sternhagen.

Nov. 20—Motion to amend findings of fact and for specific findings of fact filed by General Counsel. 11/21/36 copy served.

Nov. 27—Motion to vacate decision and reconsider opinion filed by General Counsel. 11/28/36 copy served.

Dec. 22—Motion to deny motion filed on Nov. 20, 1936, filed by tax-payer. 12/24/36 copy served.

Dec. 22—Motion to deny motion filed on Nov. 27, 1936, filed by tax-payer. 12/24/36 copy served.

Dec. 23—Order denying motion for reconsideration, entered. Dec. 23—Order denying motion to amend findings, entered.

1937

Jan. 25—Petition for review by United States Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.

Feb. 1-Proof of service filed by General Counsel.

Mar. 15—Motion for extension to June 25, 1937, to complete and transmit record filed by General Counsel.

7 Mar. 15—Order enlarging time to June 25, 1937, to prepare and transmit record, entered.

Apr. 12.—Stipulation for review by the United States Circuit Court of Appeals, 2nd Circuit, filed.

June 22—Motion for extension to Sept. 1, 1937, to complete and transmit record filed by General Counsel.

June 22—Order enlarging time to 9/1/37 to prepare and deliver record, entered.

July 2-Praecipe with proof of service thereon filed.

July 2-Agreed statement of evidence lodged.

July 2—Stipulation to consolidate as a single record and to print statement of evidence but once filed.

July 16—Copy of order from 2nd Circuit consolidating appeals as a single record and taking printed statement of evidence but once for all cases and transmitting all exhibits in physical form, filed.

July 23-Agreed statement approved and ordered filed:

Before United States Board of Tax Appeals

Docket No. 80769

JOHN J. MULCAHY, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Julius Henry Cohen, Austin J. Tobin, Esq., Wilbur LaRoe, Esq. For Comm'r: John D. Kiley, Esq., Walter W. Kerr, Esq., Geo. D. Brabson, Esq., Francis H. Urell.

1935

July 15-Petition received and filed. Taxpayer notified. paid.)

July 15—Copy of petition served on General Counsel.

Aug. 23-Answer filed by General Counsel.

Aug. 27—Copy of answer served on taxpayer.

Dec. 24-Notice of hearing at New York City week of Feb. 3, 1936.

1936

Feb. 3-Hearing had before Mr. J. M. Sternhagen, Div. 10. Submitted on the merits. Motion to consol. with 75816-77375-6-7 granted, for hearing. Continued to 2/4/36 and to 2/5/36, and to 2/6/36; appearances of Austin J. Tobin and Wilbur LaRoe, Jr., Esqs., filed. Original brief of petitioner filed. Reply to respondent due Apr. 22, 1936. Respondent's brief due Mar. 23, 1936.

Feb. 21—Transcript of hearings Feb. 3-4-5-6, 1936, filed.

Mar. 23-Brief filed by General Counsel. 4/15/36-16 copies received.

Apr. 11-Reply brief filed by taxpayer.

Apr. 11-Proposed findings of fact filed by taxpayer.

Apr. 24-Motion to correct errors in respondent's brief filed by General Counsel.

Apr. 25-Motion for leave to file reply brief filed by General Counsel. Reply brief lodged. 7/27/36 Granted.

July 28-Motion to correct transcript filed by taxpayer. 7/29/36

Granted. Let minutes be so corrected, Oct. 28—Findings of fact and opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered for petitioner.

Oct. 31-Judgment entered, Mr. J. M. Sternhagen, Div. 10.

Nov. 20—Motion to amend findings of fact and to make specific findings of fact as set forth in this motion filed by General Counsel. Copy served 11/21/36.

Nov. 27-Motion to vacate decision and reconsider opinion filed by

General Counsel. 11/28/36 copy served.

Dec. 22—Motion to deny motion filed on Nov. 20, 1936, filed by tax-payer. 12/22/36 copy served.

Dec. 22—Motion to deny motion filed on Nov. 27, 1936, filed by taxpayer. 12/22/36 copy served.

Dec. 23—Order denying motion for reconsideration, entered.

Dec. 23—Order denying respondent's motion to amend findings, entered.

1937

Jan. 25—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.

Feb. 1-Proof of service filed by General Counsel.

Mar. 15—Motion for extension to June 25, 1937, to complete and transmit record filed by General Counsel.

Mar. 12—Order enlarging time to June 25, 1937, to complete and transmit record, entered.

Apr. 12—Stipulation for review by the Circuit Court of Appeals, 2nd Circuit, filed.

June 22—Motion for extension to Sept. 1, 1937, to complete and transmit record filed by General Counsel.

June 22—Order extending time to 9/1/37 to complete and transmit record, entered.

July 2-Praecipe with proof of service thereon filed.

July 2-Agreed statement of evidence lodged.

July 2—Stipulation to consolidate as one record and to print statement of evidence but once filed,

July 16—Copy of order from 2nd Circuit consolidating appeal as a single record and printing but one statement of evidence and transmitting all exhibits in physical form, filed.

July 23-Agreed statement approved and ordered filed.

Before United States Board of Tax Appeals

Docket No. 77375

[Title omitted.]

Petition

Filed Sept. 19, 1934

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue

in his notice of deficiency (IT: AR: B-1; GLN-90D), dated July 31, 1934, and as a basis for this proceeding alleges as follows:

1. The petitioner is a citizen of the United States of America and resides at 135 Eastern Parkway, in the Borough of Brooklyn, County

of Kings, State of New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on July 31,

1934.

3. The taxes in controversy are income taxes for the calendar year 1933, for which year no tax was assessed against petitioner and for which an alleged deficiency of \$232.74 is claimed by the Treasury. Department.

4. The determination of tax set forth in said notice of deficiency is based upon the following error, to wit, that the statement annexed

to said notice of deficiency alleges that

"From information furnished by the internal revenue agent in charge at Newark, New Jersey, it appears that you received salary of \$8,137.50 from The Port of New York Authority which was not included as taxable income.

"Since it appears that this amount is not exempt from Federal

income tax your income has been increased by \$8,137.50."

5. The facts upon which the petitioner relies as a basis for this petition are as follows:

(a) The Port of New York Authority was, during the period of petitioner's employment therewith including the entire calendar year 1933, and now is, a political subdivision and governmental instru-

mentality of the States of New York and New Jersey.

18 (b) The Port of New York Authority was, during said period, and is now engaged in proper and essential governmental functions of the States of New York and New Jersey in the construction, maintenance, and operation of highway bridges and tunnels and the Inland Terminal hereinafter referred to, which it was directed to build by the States of New York and New Jersey in partial effectuation of a comprehensive plan for the development of the Port of New York adopted by the said States.

(c) The petitioner was and has been regularly employed by the said The Port of New York Authority since May 1931, through and including the entire calendar year 1933, down to the date of this petition, receiving an annual compensation therefor, payable twice

monthly throughout said period.

(d) The duties of said employment, at all times hereinbefore mentioned, consisted in the performance of all tasks as might from time to time be assigned to petitioner by the General Manager of The Port of New York Authority in connection with the construction, operation, and maintenance by the said The Port of New York Authority of a certain Inland Terminal Building, located in the block bounded by Eighth and Ninth Avenues, Fifteen and Sixteen Streets,

in the Borough of Manhattan, City, County, and State of New York, known as "Inland Terminal No. 1," and in connection with other projects and works of the aforesaid The Port of New York

Authority.

14 (e) The duties of said employment, at all times herein mentioned, consisted in the rendition of prescribed services and not the accomplishment of specific objects and the services of the petitioner were continuous and not occasional or temporary.

(f) The petitioner at all times herein mentioned was an employee of The Port of New York Authority aforesaid and not an independ-

ent contractor.

6. Wherefore, the petitioner prays that the Board may hear this proceeding and may determine that the salary received by the petitioner as an employee of The Port of New York Authority during the year 1933 was not taxable and that the reported deficiency in the sum of Two hundred thirty-two and 74/100 Dollars (\$232.74) is erroneous and that the notice thereof and the assessment of any tax thereon be set aside.

Dated New York, September 4, 1934.

(Sgd.) JULIUS HENRY COHEN,
Julius Henry Cohen,
Attorney for Petitioner,
Office & P. O. Address, 111 Eighth Avenue,
Borough of Manhattan, New York City, N. Y.

15 [Duly sworn to by Philip Gerhardt; jurat omitted in printing.]

16 Exhibit A, annexed to foregoing petition

TREASURY DEPARTMENT, ,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 31, 1934.

Address reply to Commissioner of Internal Revenue and refer to Mr. Philip L. Gerhardt,

135 Eastern Parkway, Brooklyn, New York.

Sin: You are advised that the determination of your income tax liability for the year 1933, discloses a deficiency of \$232.74 as shown in the statement attached.

In accordance with Section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing and filing of this form will

expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING, Commissioner. By Chas T. Russell, Deputy Commissioner.

Enclosures:

Statement. Form 870.

STATEMENT

IT: AR: B-1. GLN-90D.

Deficiency.

In re: Mr. Philip L. Gerhardt, 135 Eastern Parkway, Brooklyn, New-York

Year, 1933; income tax liability, \$232.74; income tax assessed, none; deficiency, \$232.74.

From information furnished by the internal revenue agent in charge at Newark, New Jersey, it appears that you received salary of \$8,137.50 from The Port of New York Authority 18 which was not included as taxable income.

Since it appears that this amount is not exempt from Federal income tax your income has been increased by \$8,137.50.

The amount of \$30.00 representing excess taxes erroneously included in schedule 17 as contributions has been eliminated and transferred to schedule 14 resulting in no net change in your income.

The adjustments in your income and the computation of your tax liability are as follows:

Net Income reported on return	(\$173.70)
· ·	
Total	• • • • • • • • • • • • • • • • • • •
oss. o. taxes increased	30.00
Adjusted net income	\$7, 963. 80
Ordinary net income adjustedess: Personal exemption and credit for 2 dependents \$3,300.00	
Net income subject to normal tax	\$4 663 90
The state of the s	@1.00 00
Normal tax at 8% on \$663.80	53. 10
on \$1,905.80	19.64
Totalotal amount assessable	9020 5
otal amount assessable	\$232. 74 eggo 74
ar previously assessed	None

Before United States Board of Tax Appeals

Docket No. 77375

[Title omitted.]

Answer

Filed Nov. 14, 1934

The Commissioner of Internal Revenue, by his attorney Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed in the above-entitled case, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

20 2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the peti-

4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition.

5. Denies the allegations of fact contained in subparagraphs (a) to

(f), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,

Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

GEORGE D. BRABSON,

Special Attorney, Bureau of Internal Revenue.
MFH 10/9/34.

21 Before United States Board of Tax Appeals

Docket No. 77377

[Title omitted.]

Petition

Filed Sept. 19, 1934

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: AR: B-1 GLN-90D), dated July 31, 1934, and as a basis for this proceeding alleges as follows:

1. The petitioner is a citizen of the United States of America and resides at 1235 Park Avenue, in the Borough of Manhattan, City,

County, and State of New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the taxpayer on July 31, 1934.

3. The taxes in controversy are income taxes for the calendar year 1933 for which an alleged deficiency of \$733.14 and penalty of \$183.29

is claimed by the Treasury Department.

4. The determination of tax set forth in said notice of deficiency and penalty is based upon the following error, to wit, that the statement annexed to said notice of deficiency alleges that

"From information furnished by the internal revenue agent in charge at Newark, New Jersey, it appears that you received salary of \$14,625.00 from The Port of New York Authority. Since this amount is not exempt from Federal income tax it has been included with fees of \$150.00, interest of \$18.46 and dividends of \$194.42 received by you and your wife, resulting in a total taxable income of \$12,915.43 after allowance of expenses of \$1,346.29 interest of \$275.00, taxes of \$314.16 and contributions of \$137.00

"In accordance with section 3176 of the Revised Statutes a 25% penalty for failure to file a return has been added to and made a part of the deficiency."

5. The facts upon which the petitioner relies as a basis for this

petition are as follows:

(a) The Port of New York Authority was, during the period of petitioner's employment therewith including the entire calendar year 1933, and now is, a political subdivision and governmental instru-

mentality of the States of New York and New Jersey.

(b) The Port of New York Authority was, during said period and is now engaged in proper and essential governmental functions of the States of New York and New Jersey in the construction, maintenance, and operation of highway bridges, tunnels, and other facilities hereinafter referred to, which it was directed to build by

the States of New York and New Jersey in partial effectuation of the comprehensive plan for the development of the

Port of New York adopted by the said States.

(c) The petitioner was and has been regularly and continuously employed by the said The Port of New York Authority since June 29, 1922, through and including the entire calendar year 1933 down to the present date, receiving an annual compensation therefor, payable

twice monthly throughout said period.

(d) The duties of said employment at all times hereinbefore mentioned consisted in the performance of all tasks as might from time to time be assigned to petitioner by the General Manager or by the Commissioners of The Port of New York Authority in connection with the construction, operation, and maintenance by The Port of New York Authority of certain bridges and tunnels between the States of New York and New Jersey known as the George Washington

Bridge, the Holland Tunnel, the Bayonne Bridge, the Goethals Bridge, the Outerbridge Crossing, and the construction of the proposed Midtown Hudson Tunnel and in connection with the construction, operation, and maintenance by The Port of New York Authority of a certain inland terminal building known as "Inland Terminal No. 1" and in connection with other projects and works of the aforesaid The Port of New York Authority.

(e) The duties of said employment at all times herein mentioned consisted in the rendition of prescribed services and not the acceptable was a specific chiefs and the services of the petition.

24 complishment of specific objects, and the services of the petitioner were continuous and not occasional or temporary.

(f) The petitioner at all times herein mentioned was an employee of The Port of New York Authority aforesaid and not an independent contractor.

(g) Neither the gross income nor the net income of petitioner, exclusive of the salary received as an employee of The Port of New York Authority, was sufficient to require the filing of an income tax

return for the calendar year 1933 by the petitioner.

WHEREFORE, the petitioner prays that the Board may hear this proceeding and may determine that the salary received by the petitioner as an employee of The Port of New York Authority during the year 1933 was not taxable and that the petitioner was not required to file a tax return for said year and that the reported deficiency in the sum of Seven hundred thirty-three and 14/100 Dollars (\$733.14) and the alleged penalty thereon in the sum of One hundred eighty-three and 29/100 Dollars (\$183.29) is erroneous and that the notice thereof and the assessment of any tax thereon be set aside.

Dated New York, September 4, 1934.

JULIUS HENRY COHEN, (Sgd.)
JULIUS HENRY COHEN,

Attorney for Petitioner,
Post Office Address & Office, 111 Eighth Avenue,
Borough of Manhattan, New York City.

25 [Duly sworn to by Billings Wilson; jurat omitted in printing.]

26 Exhibit A, annexed to foregoing petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 31, 1934.

Address reply to Commissioner of Internal Revenue and refer to Mr. Billings Wilson,

1235 Park Avenue, New York, New York.

Sin: You are advised that the determination of your income tax liability for the year 1933, discloses a deficiency of \$733.14 and penalty of \$183.29 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is

hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of

27 Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By Chas. T. Russell,

Deputy Commissioner.

Enclosures: Statement.

Form 870.

STATEMENT

IT: AR: B-1. GLN-90D.

In re: Mr. Billings Wilson, 1235 Park Avenue, New York, New York

INCOME TAX LIABILITY

Year, 1933; income tax liability, \$733.14; income tax assessed, none; deficiency, \$733.14; penalty, \$183.29.

From information furnished by the internal revenue agent in charge at Newark, New Jersey it appears that you received salary of \$14,625.00 from The Port of New York Authority. Since this amount is not exempt from Federal income tax it has been included with fees of \$150.00, interest of \$18.46 and dividends of \$194.42 received by you and your wife, resulting in a total taxable income of \$12,915.43 after allowance of expenses of \$1,346.29 interest of \$275.00, taxes of \$314.16 and contributions of \$137.00.

A synopsis of your income and deductions therefrom and the computation of your tax liability are as follows:

Schedule 1: Salary—The Port of New York Authority \$14, 625.00 Concert Fees _______ 150.00

1, 346. 29

\$14, 775.00

Schedule 3: Interest on bank deposits, notes, corporation bonds____ \$13, 428.71

Schedule 10: Dividends	194, 42
Schedule 12: Total	\$13, 641, 50
Schedule 13: Interest\$275.00	4-04 0000
Schedule 14: Taxes paid 314.16	
Schedule 17: Contributions 137.00	,
Schedule 19: Total deductions	726, 16
Schedule 20: Net income	\$12, 915. 43
00 .	
29 COMPUTATION OF TAX	
Ordinary net income adjusted	219 015 40
less:	\$12, 910, 43
Dividends	
Personal exemption and credit for one dependent 2,900.00	
	3, 094, 42
Net income subject to normal tax	\$9, 821, 01
Normal tax at 4% on \$4,000.00	
Normal tax at 8% on \$5,821.01	4
Surtax on \$12,915.43	
Total	\$733. 14
Tax liability	\$733.14
Plus: 25% penalty for delinquency	183, 20
Total amount assessable	\$916, 43
Tax previously assessedNone. Penalty previously assessedNone.	None
Deficiency	\$916. 48
In accordance with section 3176 of the Revised Statut	on n 050

In accordance with section 3176 of the Revised Statutes a 25% penalty for failure to file a return has been added to and made a part of the deficiency.

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Before United States Board of Tax Appeals

Docket No. 77377

[Title omitted.]

Answer

Filed Nov. 14, 1934.

The Commission of Internal Revenue by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed in the above entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition.

5. Denies the allegations of fact contained in subparagraphs (a)

to (g), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,

Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

Geo. D. Brabson, Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 80769

[Title omitted.]

Petition

Filed July 15, 1935.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal-

Revenue in his Notice of Deficiency (I.T.: A.P.: A-2, ABB-90D) dated April 24, 1935, and, as a basis for his pro-

ceeding, alleges as follows:

1. The petitioner is an individual, a citizen of the United States of America, now residing at Blairstown, County of Warren, State of New Jersey, with a business address at 111 Eighth Avenue, New York, N. Y. Petitioner is designated in said Notice as "J. J. Mulcahy, 19 West Street, New York, N. Y." which designation corresponds with the customary signature of the petitioner, but petitioner's full name is "John J. Mulcahy" and not J. J. Mulcahy, as set forth in said Notice of Deficiency.

2. Notice of Deficiency (a copy of which is attached and marked

Exhibit A) was mailed to the taxpayer on April 24, 1935.

3. The taxes in controversy are income taxes for the calendar year 1932 and for which an alleged deficiency of \$695.00 and penalty of \$173.75, making a total of \$868.75, is claimed by the Treasury Department.

4. The determination of tax set forth in said Notice of Deficiency

is based on the following errors:

First: The statement annexed to said Notice of Deficiency alleges that

"A return has been prepared under authority of section 3176 of the Revised Statutes, as the records of this office indicate that you filed no return for the year 1933"

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although no obligation on your petitioner to file a return either for the year 1932 or said year 1933 is prescribed either by law or by regulation made under authority of law.

Second: The statement annexed to said Notice of Deficiency alleges

that

"Information on file in this office indicates that you received compensation of \$10,950.00 from The Port of New York Authority in the year 1932"

and proceeds to compute a deficiency in tax on this income in disregard of the fact that said income, although received by your petitioner in said year, was not and is not subject to Federal income tax.

Third: The form of report prepared by the Commissioner, in behalf of the petitioner, is based upon insufficient information and fails to allow to the petitioner deductions from gross and net income to which petitioner would be entitled in the event that it should be held that income received by the petitioner from The Port of New York Authority is subject to Federal tax.

5. The facts upon which the petitioner relies as a basis for this

petition are as follows:

(a) The Port of New York Authority was, during the period of petitioner's employment therewith including the entire calendar year 1932, and now is, a political subdivision and governmental instrumentality of the States of New York and New Jersey, created by Compact between the States of New York and New Jersey, signed April 30, 1921, pursuant to Chapter 151 of the Laws of New Jersey, 1921, and Chapter 154 of the Laws of New York, 1921, approved by the Congress of the United States (Public Resolution No. 17—67th Congress; S. J. Res. 88 [August 23, 1921]).

(b) The Port of New York Authority was, during said period and is now engaged in proper, usual and essential governmental functions of the States of New York and New Jersey in the construction, maintenance and operation of highway bridges, tunnels and other facilities hereinafter referred to, which it was directed to build by the States of New York and New Jersey in partial effectuation of the Comprehensive Plan for the development of the Port of New

York adopted by the said States.

(c) The petitioner was and has been regularly and continuously employed by the said The Port of New York Authority since June 1st, 1928. Petitioner was originally employed as Assistant to the Chief Executive Officer. On May 8th, 1930, upon the change of the title of the Chief Executive Officer to General Manager, petitioner was elected an Assistant General Manager of The Port of New York Authority, which office petitioner has held down to the present date. In connection with both positions, petitioner has devoted his entire

time to his employment by the Port Authority, taking no other employment, and has received an annual compensation therefor, payable twice monthly throughout said period.

(d) The duties of said employment at all times hereinbefore mentioned consisted in the performance of all tasks as might from time to time be assigned to petitioner by the General Manager or by the Commissioners of The Port of New York Authority in connection with the effectuation of the Comprehensive Plan for the development of the Port of New York District, adopted by the States of New York and New Jersey (Chapter 9 of the Laws of New Jersey, 1922, and Chapter 43 of the Laws of New York, 1922) and approved by the Congress of the United States (Public Resolution No. 66-67th Congress; H. J. Res. 337 [July 1, 1922] including the construction, operation and maintenance by The Port of New York Authority of certain bridges and tunnels between the States of New York and New Jersey known as the George Washington Bridge, the Holland Tunnel, the Bayonne Bridge, the Goethals Bridge, the Outerbridge Crossing, and the construction of the new Midtown Hudson Tunnel and in connection with the construction, operation and maintenance by The Port of New York Authority of a certain inland terminal building known as "Inland Terminal No. 1," and other projects and works of port development and improvement of the aforesaid The Port of New York Authority, undertaken pursuant to said Compact and Comprehensive Plan.

(e) The duties of said employment at all times herein mentioned, consisted in the rendition of prescribed services and not the accomplishment of specific objects and the services of the

petitioner were continuous and not occasional or temporary.

(f) The petitioner at all times herein mentioned was an employee of The Port of New York Authority aforesaid and not an independent contractor.

(g) Neither the gross income nor the net income of petitioner, exclusive of the salary received as an employee of The Port of New York Authority, was sufficient to require the filing of an income tax return for the calendar year 1932 by the petitioner.

(h) Both the petitioner and The Port of New York Authority were, prior to the date set by law for the filing of income tax reports for the year 1932, advised by counsel that the salary received by the petitioner as an employee of The Port of New York Authority was

not subject to Federal income tax.

(i) That no personal inquiry was made, either of the petitioner or any authorized representative of the petitioner, by the Commissioner of Internal Revenue or by a collector or deputy collector or any representative of the Commissioner, or of the collector or the deputy collector, as to whether petitioner was married or had any dependents in said calendar year 1932 or as to whether petitioner was entitled to any deductions against either net or gross income which

might reduce the amount of his tax liability for said year in the event that it should be held that the income received by petitioner from The Port of New York Authority is subject to Federal tax. That your petitioner and representatives of your petitioner were ready and willing to give to the Commissioner of

Internal Revenue, to the Collector of Internal Revenue or any deputy collector or any authorized representative of said Commissioner, or collector or deputy collector, such information as they or any of them might desire in connection with the preparation of a form of report, but neither your petitioner nor any authorized representative of the petitioner was ever asked to give such information.

(j) The petitioner is entitled to the following exemptions and deductions against any income received from petitioner in said

calendar year 1932 which may be held to be taxable;

(1)	Personal exemption, as married and living with the wife during	
1	the entire taxable year	\$2,500
(2)	Deduction for interest paid	285
(3)	Deduction for taxes paid	380
(4)	Deduction for contributions	900

Wherefore, the petitioner prays that the Board may hear this proceeding and may determine that the salary received by the petitioner as an employee of The Port of New York Authority, during the year 1932, was not taxable and that the petitioner was not required

to file a tax return for said year and that the reported deficiency in the sum of \$695.00 and the alleged penalty thereon in the sum

of \$173.75, is erroneous and that the Notice thereof and the assessment of any tax thereon be set aside. In the alternative, and in the event that this Board determines that the petitioner was required to file a report for the calendar year 1932, the petitioner prays that the deductions and allowances against income as set forth in this petition be allowed by this Board.

Dated New York, June 25th, 1935.

(Signed) Julius Henry Cohen,
Julius Henry Cohen,
Attorney for Petitioner,
Office & P. O. Address, 111 Eighth Avenue,
Borough of Manhattan, New York City.
[Duly sworn to by John J. Mulcahy; jurat omitted in printing.]

39 Exhibit A, annexed to foregoing petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Apr. 24, 1935.

Address reply to Commissioner of Internal Revenue and refer to Mr. J. J. MULCAHY,

19 West Street, New York, New York.

Sin: You are advised that the determination of your income tax liability for the year(s) 1932, discloses a deficiency of \$695.00 and penalty of \$173.75 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not

counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of

Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By Chas. T. Russell,

Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT: AR: A-2. ABB-90D.

In re: Mr. J. J. Mulcahy, 19 West Street, New York, New York

INCOME TAX LIABILITY

Year 1932; income tax liability \$695.00, penalty \$173.75; income tax assessed, none; deficiency \$695.00, penalty \$173.75.

Information on file in this office indicates that you received compensation of \$10,950.00 from the Port of New York Authority in the year 1932.

The deficiency in tax on this income was computed as follows:

Compe	ensation	\$10, 950, 00
Less:	Personal exemption	1, 000, 00
	Balance subject to normal tax	\$9, 950. 00 \$160. 00
1	Total tax Tax assessed	\$695. 00 none
	Deficiency in tax	\$695.00 \$173.75

A return has been prepared under authority of section 3176 of the Revised Statutes, as the records of this office indicate that you filed no return for the year 1933.

Before United States Board of Tax Appeals

Docket No. 80769

[Title omitted.]

Answer

Filed August 24, 1935

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed in the above-entitled case, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and

3 of the petition.

4. Denies the allegations contained in subparagraphs First, Second, and Third of paragraph 4 of the petition.

5. Denies the allegations contained in subparagraphs (a) to (j),

inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,

Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

GEORGE D. BRABSON,

VERNON F. WEEKLEY,

Special Attorneys, Bureau of Internal Revenue.

VFW: MFH. 8/22/35.

Before United States Board of Tax Appeals

MONTGOMERY B. CASE, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PHILIP L. GERHARDT, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
E. MORGAN BARRADALE, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT BILLINGS WILSON, PETITIONER

Commissioner of Internal Revenue, respondent.

John J. Mulcahy, petitioner

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 75816, 77375, 77376, 77377, 80769

Findings of fact and opinion

Promulgated October 28, 1936

The compensation of officers and employees of the Port of New York Authority held immune from Federal income tax. Julius Henry Cohen, Esq., Austin J. Tobin, Esq., and Wilbur La Roe, Jr., Esq., for the petitioners.

George D. Brabson, Esq., Francis H. Uriell, Esq., and John D.

Kiley, Esq., for the respondent.

Respondent determined the following deficiencies and penalties in petitioners' income taxes:

	Year	Deficiency	Penalty
Montgomery B. Case Philip L. Gerhardt E. Morgan Barradale Billings Wilson John J. Mulcahy	1931 1933 1933 1933 1932	\$551. 99 232. 74 439. 57 733. 14 695. 00	\$100, 86 183, 26 173, 75

The petitioners were employees of the Port of New York Authority, and assail the inclusion in their income of the compensation paid to them by the Port Authority.

Findings of fact

Montgomery B. Case is a resident of Englewood, New Jersey; Philip L. Gerhardt, of Brooklyn, New York; E. Morgan Barradale, of South Orange, New Jersey; Billings Wilson, of New York, New York; and John J. Mulcahy, of New York, New York. All were employees of the Port of New York Authority in the respective taxable years.

The Port of New York Authority (herein called the Port Authority) is a corporate body organized pursuant to a compact entered into between the States of New York and New Jersey on April 30, 1921, to which Congress consented by a resolution approved August 23, 1921. After reciting the great growth of commerce in the port of New York, and the benefit of cordial cooperation between the States of New York and New Jersey in the encouragement of capital investment and the formulation and execution of necessary physical plans through a joint agency, the compact created and defined the limits of a port district, and provided for the creation of the Port Authority as a body, corporate and politic, consisting of 12 commissioners:

lease and/or operate any terminals or transportation facility within

¹Ch. 154, Laws of New York, 1921; ch. 151, Laws of New Jersey, 1921.

²Public Resolution No. 17, 67th Cong. (S. J. Res. 88).

said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. * * *"

Under the terms of the compact, the Port Authority was not empowered to pledge the credit of either state except by legislative per-

mission; facilities owned or operated by it were made subject to regulatory laws and regulating commissions as if owned or operated by a private corporation, and the powers of any municipality to develop or improve port and terminal facilities were left unimpaired. A plan for comprehensive port development was to be adopted by the legislatures of the two states, and the Port Authority was directed to make plans from time to time, supplementary or amendatory thereto; to make recommendations to the legislatures or to Congress for the better conduct of the port's commerce and for the increase and improvement of its transportation and terminal facilities, and to institute or intervene in proceedings before the Interstate Commerce Commission and like bodies to further such improvements. It was authorized to make suitable rules and regulations, subject to constitutional limitations and the exercise of the power of Congress, for the conduct of navigation and commerce, to be effective upon the concurrence or authorization of the state legislatures. It was authorized to provide penalties for violations thereof, and they have been provided and incorporated into the states' criminal laws. It was given power to fix tolls and charges for the use of all its facilities. Salaries and other expenses incurred by it were to be appropriated by the state legislatures until its operating revenues were adequate to meet them, and power to incur obligations prior to such appro-

priations was denied.

This compact, which amended and supplemented a former one entered into between New York and New Jersey in 1834, was induced

by the necessity, widely recognized, for joint state action in the
development as a whole of the Port of New York which lies
partly within the jurisdiction of each state. It was evolved
after a series of efforts by the two states. Between 1911 and 1914
New Jersey appointed several successive commissions to study the
port problem in cooperation with a New York commission. After
reports by these commissions, New Jersey made efforts to secure a
readjustment of freight rates to the port district, which led to a proceeding before the Interstate Commerce Commission, New York Harbor Case, 47 I. C. C. 643, and aroused considerable opposition from the
State and City of New York and various civic and commercial organizations. As a result of discussion of the desirability of unifying
the port's transportation system, the New York-New Jersey Port and
Harbor Development Commission was created by the legislative ac-

tion of each state in 1917, and \$450,000 was appropriated for its study of port and harbor conditions. After a thorough survey the Commission made a report to the legislatures in 1918, recommending a bistate corporate agency to carry out a comprehensive plan of port

development, and a bistate legislative commission was appointed to cooperate with the former commission in a revision of its tentative proposals. This joint commission submitted a voluminous report in 1919, which, after reviewing the growing commerce of the port, the inefficiency of its terminal facilities, and the resulting hardship on its eight million inhabitants, described the port problem as primarily a railroad problem, and urged the adoption of an improvement plan comprising a complete reorganization of railroad terminal

facilities, a joint operation and connection of railway belt lines, pier improvements, the establishment of food distribution stations, warehouses, highways, etc. The adoption of this program was urged by two successive governors of New York as a public necessity, and the requisite acts for the compact creating the Port Authority were finally passed by the legislatures of both states in April 1921.

Pursuant to the mandate of the compact, the Port Authority investigated conditions within the port district, and recommended to the governors of the two states a comprehensive plan of port improvement in a report dated December 21, 1921. This comprehensive plan was adopted by acts of the legislatures of each state passed and approved in 1922. It embraced nine "principles to govern development," as follows: (1) Unification of terminal operations within the port district; (2) consolidation of shipments to eliminate duplication of effort and inefficient loading; (3) routing of commodities to avoid centers of congestion; (4) establishment of union terminal stations; (5) coordination of port and terminal facilities; (6) tunnels and bridges for freight; (7) Federal improvement of channels; (8) highways for distribution by trucks; and (9) methods for prompt relief pending future development. More specifically, the plan called for tunnels and bridges connecting New York and New Jersey, suit-

able markets, union inland terminal stations and warehouses in Manhattan, numerous belt railway lines and connections within the port district, an automatic electric system connecting Manhattan with the middle belt line and railroads, and union terminal stations in Manhattan to contain storage space and space for other facilities.

The Port Authority was further directed by the acts to proceed in accordance with the plan as rapidly as might be economically possible, with all necessary constitutional powers except that of levying taxes or assessments, to request Congress to make appropriations for deepening and widening channels, to apply to all Federal agencies for assistance, to cooperate with state highway commissioners so that state trunk highways might fit into the plan, to render such advice, suggestions, and assistant to municipal officials as would permit local and municipal port improvements to fit into the plan. Section 8 provides further:

thority shall at all times be free from taxation by either state. The

⁸Ch. 43, Laws of New York, 1922; ch. 9, Laws of New Jersey, 1922.

port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

Congress approved the plan by Joint Resolution of July 1, 1922, expressly reserving Federal rights and jurisdiction over the region

affected.

Authority that they favored the construction at the earliest possible moment of bridges and tunnels between New York and New Jersey. The Port Authority proceeded to make preliminary studies of traffic conditions, building costs, and other pertinent questions of various bridges and tunnels, and in its consideration of the several proposed projects, held public hearings after published notice, which were attended by the public and representatives of various interested organizations, who frequently had conflicting views. It conferred and cooperated with commissions and agencies which had studied or were interested in the particular project. It considered prior studies and reports of individuals and commissions related thereto, and made full reports to the governors and legislatures of its findings and recommendations.

After these studies and reports, the state legislatures in 1924 passed acts authorizing the Port Authority to construct, operate, maintain, and own two bridges with he necessary approaches across the Arthur Kill, one between Perth Amboy, New Jersey, and Tottenville, New York, and one between Elizabeth, New Jersey, and Howland Hook, New York, and appropriated \$200,000 therefor. The Port Author-

ity thereupon made borings, surveys, and engineering studies as to the character and location of the bridges, thoroughly 51 canvassed local sentiment, attended meetings of local interests and meetings with committees appointed by the mayors of the three municipalities concerned, made counts of the vehicular traffic crossing all ferries on the Arthur Kill and Kill van Kull, investigated the records of the ferry companies, and made other pertinent studies. In 1925 construction of the proposed bridges was approved by the War Department, and in 1926 commenced. The bridges, known as the Outerbridge Crossing Bridge and the Goethals Bridge, respectively, were completed on June 29, 1928, at a cost of over \$17,000,000, financed by advances of \$4,000,000 to the Port Authority by the two states and the sale of "New York-New Jersey Interstate Bridge Bonds-Series A" in the amount of \$14,000,000. The bridge approaches were designed in cooperation with the state highway commissions to fit into the highway system and allow a circular flow of traffic at full capacity. In March 1931 the Port Authority en-

<sup>Ch. 230, Laws of New York, 1924; ch. 125, Laws of New Jersey, 1924.
Ch. 186, Laws of New York, 1924; ch. 149, Laws of New Jersey, 1924.</sup>

gaged in the operation of a bus service across the Goethals Bridge to maintain traffic formerly attracted by private companies which had failed.

In 1925 the legislatures of the two states similarly authorized the Port Authority to construct, operate, maintain, and own a bridge, with the necessary approaches, across the Hudson River from Man-

hattan to Fort Lee, New Jersey, and each appropriated \$100,000 for the preliminary studies. After reports to the governors, the Port Authority commenced construction in 1927,
and on October 25, 1931, this bridge, known as the George Washington Bridge, was opened to traffic, having been completed at a cost of
over \$57,000,000, financed by state advances of \$9,800,000 and the
sale of "New York-New Jersey Interstate Bridge Bonds—Series B"
in the amount of \$50,000,000.

In the construction of this bridge, the Port Authority acquired four blocks in Manhattan between 178th and 179th Streets, over which it built an elaborate system of approach ramps to Riverside Drive. It is now completing a tunnel, carrying the approaches to the east side of Manhattan, which will be dedicated to the city and used by local traffic. On the New Jersey side the approaches were arranged to merge highway routes 1, 4, and 6 into a junction, running back to forkings a mile from the bridge head. The bridge has a traffic capacity for 30,000,000 vehicles annually. Its center section was left unpaved because unnecessary for present demands.

By similar legislation in 1925 the Port Authority was authorized to construct, operate, maintain, and own a bridge with the necessary approaches across the Kill van Kull from Bayonne, New Jersey, to Staten Island, New York, which, after studies and reports, was begun in 1928 and completed in 1931, at a cost of over \$13,000,000,

financed by state advances of \$4,100,000 and the sale of "New York-New Jersey Interstate Bridge Bonds, Series C" in the amount of \$12,000,000. This is known as the Bayonne Bridge. Its approach in Bayonne was carried across railroad yards and waterfront streets to a less congested section of the city, and in Staten Island was laid over a filled-in quarry and arranged to permit a circular flow of traffic.

The Port Authority has continuously owned, maintained, and operated these four bridges, charging tolls to defray their maintenance, operation, and general expenses and to meet interest charges and pay off the bonds, state advances, and debt service on general and refunding bonds (which, however, under existing statutes can not be issued for any facilities except four terminals), and, through its general reserve fund, debt service on its other bonds now outstanding.

In 1934, the Outerbridge Crossing and Goethals Bridges produced tolls exceeding \$400,000, paid by over 800,000 vehicles; the George Washington Bridge, \$3,300,000, paid by over 6,150,000 vehicles; and the Bayonne Bridge, \$210,000, paid by over 450,000 vehicles. The

Ch. 211, Laws of New York, 1925; ch. 41, Laws of New Jersey, 1925.
 Ch. 279, Laws of New York, 1926; ch. 97, Laws of New Jersey, 1825.

rate of toll was determined by the estimated annual amount necessary to meet operating expenses and interest and to provide a net amount for application against outstanding bonds. Since the Port Authority can raise money only by the sale of its securities or state advances, these estimates were made available to bankers interested in bidding for its bonds. Income or deficits from operation have been as follows:

84	*	 Year		. ,	Goethals and Outerbridge Crossing Bridges	Washington- Bridge	Bayonne Bridge
1928. 1929. 1930. 1931. 1932. 1933. 2934.			*******		\$272, 676, 78 76, 683, 54 40, 673, 37 -23, 340, 21 -187, 272, 17 -295, 534, 46 -298, 851, 29	\$504, 264, 08 1, 473, 363, 61 1, 142, 770, 42 1, 356, 476, 67	1 \$25, 400. 2 -101, 466. 1 -240, 890. 1 -163, 848. 6

¹ Interest for this year was charged to investment account.

Deficits were met from a general reserve fund of the Port Authority, and, in its annual reports, were attributed to a decline in traffic

caused by the depression.

In the operation of these bridges, the Port Authority maintains a uniformed police force who are designated by statute as regular peace and police officers of both states with the usual police power to make arrests and issue summons. Between 1928 and 1935 the Port Authority, in connection with its development of bridge and tunnel approaches, acquired apartment houses and store buildings which it rented to minimize its loss of capital investment before their demolition. These operations resulted in a net income of \$36,115.61 in 1931 and losses of \$47,356.91 and \$61,482.63 in 1932 and 1933, re-

55 spectively. On December 31, 1933, it also had investments, aggregating \$10,000, in the stock of 10 wholly owned subsidiary corporations, organized to acquire property for its projects or to manage the properties acquired for bridge and tunnel ap-

proaches before their utilization as such.

After studies begun in 1906 and culminating in legislation by New York and New Jersey for the construction of an interstate vehicular tunnel under the Hudson River, the Holland Tunnel was constructed between Manhattan and New Jersey pursuant to a bistate compact of December 30, 1919, and plans evolved by the New Jersey Interstate Bridge and Tunnel Commission and the New York Interstate Bridge and Tunnel Commission. The cost of this tunnel was met by direct appropriations of New York and a bond issue of New Jersey, which has since been refunded by a bond issue of the Port Authority. It was operated by the two commissions until 1930, when each state passed an act * merging the commissions with the Port Authority, which was thereby vested with the control, operation, and main-

Ch. 388, Laws of New York, 1928, 2h. 113, Laws of New Jersey, 1932.
 Ch. 421, Laws of New York, 1930; ch. 247, Laws of New Jersey, 1930.

tenance of the tunnel. In 1931 additional acts 10 were passed in which, in the interest of the general public, the states agreed:

"* That the construction, maintenance, operation,

and control of all such bridges and tunnels, heretofore or hereafter authorized by the two states, shall be unified under the port of New York authority * *, to the end that the tolls and other revenues therefrom shall be applied so far as practicable to the costs of the construction, inaintenance, and operation of said bridges and tunnels as a group and economies in operation effected, it being the policy of the two states that such bridges and tunnels shall as a group be in all respects self-sustaining."

The Holland Tunnel'is producing a surplus of revenue which goes into the Port Authority's general reserve fund for application to

deficits of other projects.

The state legislatures further authorized the Port Authority to make plans for and construct a second tunnel to be known as the Midtown Hudson Tunnel, a project for the study of which each had appropriated \$200,000 im 1930.11 After studies and reports covering several years the Port Authority began construction in 1934, and expects to complete the work by 1938, at an estimated cost of \$37,500,000 for the southern tube. It has acquired a 100-foot strip of land one-half mile long for the tunnel's Manhattan approach at 39th Street and 10th Avenue, and property in Weehawken for an elaborate

New Jersey approach connecting with the state's highway system. The cost of construction is being met by a loan arrangement from the Federal Emergency Administration of Public Works, by virtue of which \$2,500,000 of Midtown Hudson Tunnel notes were issued to refund prior bank losses for the project and the Government purchased intallments of aggregating \$12,300,000. In entering into this agreement, the Public Works Administration required and received the opinion of the Port Authority's general counsel that its notes were exempt from state and Federal taxation.

The Port Authority has extensively studied the port district's system of transportation, highway, and terminal facilities and methods of handling freight used by the railways, ferry companies, and other transportation agencies, and has sought methods of remedying street, highway, and waterfront congestion with the district. In its reports, which are made annually or more often, it advised the governors and legislatures of both states that it was taking steps to remedy the congestion by an integrated and coordinated system of union inland freight terminals at various points in the port district, and it has been assisted in these projects by state appropriations and requisite legislation. It referred in its 1927 report to eight inland terminals in Manhattan already operated by railroads.

The location and character of the first unit of this system, Inland Terminal No. 1, was determined after exhaustive research and studies and a public hearing at which the views of representatives of munici-

Ch. 47, Laws of New York, 1931; ch. 4, Laws of New Jersey, 1931.
 Ch. 426, Laws of New York, 1930; ch. 248, Laws of New Jersey, 1930.

palities, railroads, shippers, consignees, warehousemen, civic and trade associations, property owners, and others interested were The Port Authority finally resolved to acquire a 58 city block in Manhattan bounded by 15th and 16th Streets and 8th and 9th Avenues, and to erect upon it a terminal building of basements and upper'stories, the basements and ground floor of which should be leased to trunk line carriers for receipt and delivery of freight and the upper floors leased for office, loft, and The project received the approval of manufacturing purposes. the governors and legislatures; and on December 31, 1930, the Port Authority entered into an agreement with the eight trunk line railroads entering the port district, after some initial reluctance on their part, to lease to them substantially all of the street and basement floors of the projected building for five years, with renewal options for nine successive five-year periods, to be used as a terminal station for the transportation, assemblage, and distribution of less than

The Port Authority acquired the proposed site by condemnation, and erected on it a building of 15 floors, 800 feet long and 200 feet wide, covering the entire block, and known as the Port Authority Commerce Building. The basement and 95 percent of the street floor are devoted to terminal purposes under the lease as a union station, without subdivision among the carriers, and the 13 upper floors are rented for manufacturing, office, loft, and industrial business purposes. The Port Authority maintain the portions of the building used for terminal purposes, but its facilities have been operated by the lessee railways since October 1932 through a joint agent, who is not an employee of the Port Authority. Under the system adopted by the railroads, shippers deliver less

carload freight.

than carload freight, usually in the afternoon, by truck to the terminal on a street level platform; the freight is there received by the railroads' joint labor force and conveyed to the other side of the building where shipments for each railroad are assembled and conveyed to their respective rail heads. In the morning, incoming freight is similarly delivered to the consignee's truck from the street level platform. Formerly, shippers were obliged to deliver packages for different railroads to their separate pier stations and likewise to collect in-bound freight from these widely separated points. The union terminal has lightened traffic congestion and effected substantial savings to merchants in time and trucking costs, attracting deliveries even from New Jersey, Brooklyn, and Queens. Its facilities have been planned to take care of increased business in the future, only 10 percent of its capacity being utilized at present. The first year of operation it handled 40,000 tons of freight, and it is now handling between 60,000 and 70,000 tons a

The railroads' pier terminals have not been eliminated because of this single union terminal, however, although some have been

closed or transferred, but the Port Authority's program contemplates a gradual elimination of the use of the piers for terminal purposes by the construction of a total of 12 union terminals in equal zones as found practicable; the erection of a second in New Jersey is now contemplated. A large percentage of these piers is owned and leased by New York City. Besides the less than car-

load freight, the piers also handle carload consignments and perishables, which the union terminal does not receive. The Port Authority plans to induce the roads eventually to transfer carloads to trucks on the Jersey shore, and convey them for store-door delivery in New York. Perishables and dairy products are confined by an extensive underground refrigeration system to a district in lower west Manhattan, and their handling through the

inland terminal is not contemplated.

Tenants for the upper floors of the Commerce Building are solicited by real estate agents and advertising, and occupy the premises under leases, sometimes with a sliding rental scale. Its rates are somewhat higher than commercial rates for new leases, but 95 percent of available space is now rented. Offices of the Port Authority are located on the fifteenth floor. The nonterminal portion of the building is operated for the Port Authority by a superintendent and 92 men; 8 percent is rented for stores and offices and 92 percent as loft space. Its construction and rental were deemed necessary to provide sufficient revenue to make the terminal facility economically practical, for the Port Authority received no subsidy for the terminal from the states, and had to raise its \$16,000,000 cost by bonds. To sell the bonds its was necessary to show sufficient prospective revenue from the project to make them attractive.

As the keystone of its objective to simplify traffic, the Port Authority has made studies and plans to connect the railroads entering the district by a series of belt lines running through tunnels and other

proposed connections. Water traffic in the port suffers interference from fog about 5 percent of the time, and from ice or ice drifts during January, February, and March. Before the opening of the Holland Tunnel there were six tubes of the Pennsylvania and the Hudson and Manhattan railroads under the Hudson River, but no vehicular highway between Manhattan and New Jersey, and ferries were taxed to capacity. Freight from New Jersey was brought by ferries to Manhattan, where it was impossible to expand the approaches, and the long lines of vehicles swaiting service caused great congestion in the adjoining streets. Of the 45 railroad terminal piers clustered around the south rim of Manhattan, 38 are still in use, and while the Holland Tunnel now draws off a great number of vehicles from this section, traffic in the port district has doubled in each of the past two decades, and the congestion remains very great. The separate operation of watercraft, moreover, by the several railroads for freight delivery entails overlappings and waste of efforts by the movement of partially loaded boats, which a consolidation of marine activities would eliminate, and the Port Authority has made unsuccessful efforts

to work out a coordinating scheme with the roads.

In furtherance of the proposed belt lines connecting the railroads, the Port Authority investigated the possibility of an automatic electric railway system, but abandoned it as too expensive. It next proposed the construction of a Greenville-Bayridge Tunnel to connect the roads on the two sides of the port, but after the accumulation of

data and drafting of plans, the railroads declined to contract to use the tunnel, and the Port Authority then devoted its atten-

tion to the inland terminal system.

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In order to improve transportation conditions, reduce living costs. and enable the Port of New York to meet the competition of other ports, the Port Authority has cooperated with the state Dock Commission in its study of long piers to accommodate large liners; and in matters of harbor modifications, such as channel widening and deepening, subject to the approval of army engineers, it has made suggestions, surveys, and taken part in hearings. It has made studies and suggestions for the coordination of railway marine activities embodied in reports submitted to the road's coordinating agents. It has complied with requests of outlying points to clear the harbor of ice by getting the use of coast guard ice-breakers and has vainly sought Federal legislation to supply more breakers. It has studied the transportation of cargoes of explosives, gasoline, and chemicals, and induced the Federal Government to make regulations for their control, which its staff assisted in framing. At the request of municipalities it has prepared reports on the location of free ports or tariff zones, and gratuitously cooperates with and advises district municipalities on port development. It has promulgated regulations concerning the storage period of freight on the railroads' piers, designed to relieve the congestion caused by a consignee's failure to remove for long periods, about which complaints had been made by shippers, inconvenienced and delayed by the accumulations. It has opposed efforts of outports before the Shipping Board to secure New

York shipping. It has participated and given evidence in actions before the Interstate Commerce Commission brought by competitive ports to obtain rates favorable to them in relation to New York rates, where the principle involved affected many commodities

or a large rate adjustment.

It coordinates and assists in litigation affecting commerce, but does not supplant the efforts of the states, municipalities, and such agencies as the Chamber of Commerce, Produce Exchange, and Maritime Exchange. It has cooperated in the issuance of rules affecting navigation and commerce and has prescribed rules for the regulation of its own facilities, and further protected them by the erection of navigation lights and buoys. It has attempted to fix rates for harbor lighterage through negotiation with the railroads. It neither

owns nor operates piers, ferries, tugs, ships, or dredges, but its facilities are in competition with the ferry companies and have reduced their traffic and earnings, and one company has gone out of business. These companies either are privately owned or are operated by railroads, and in either case are subject to state and Federal taxation. The Port Authority seeks to increase the traffic over its bridges and tunnels by advertisements in journals and public places. In 1933 it actively and successfully opposed a private company's application to the War Department for a permit to construct another bridge across the Hudson.

The Port Authority's projects have been financed by state appropriations, by state advances repayable from the projects' revenue,

and by issues of bonds and notes. Of the latter, series A, B, and C are each secured by a first lien upon the revenue of a particular project, subject to suspension as to current revenue when an amount equal to 20 percent of the issue is accumulated in sinking or special reserve funds over and above current interest and maturities. Repayment of state advances from a bridge's revenue is subject to the prior lien of the bridge bonds. All the bonds have by contract been issued as exempt from state and Federal tax on advice of counsel that they were so exempt.

Upon issuance of its bonds, series D and E, secured by revenues of the Holland Tunnel and Inland Terminal No. 1, respectively, the Port Authority pledged its general reserve fund as security for all its outstanding issues, including prior bridge issues, and in 1935 it adopted a program for the refunding of its then outstanding obligations, aggregating \$152,000,000 (series A to E, inclusive, and Midtown Hudson Tunnel notes) through the medium of its general and refunding bonds, which are supported by a pledge of its general reserve fund and (subject to prior liens and to the repayment of state advances) by a pledge of revenues of projects now in operation or under construction. In addition, all bonds acquired pursuant to the refunding program with the proceeds of general and refunding bonds are pledged as collateral security for the latter. Each issue so pledged is to be fully retired and canceled when the entire issue has been acquired, except that no bridge issue is to be fully retired and canceled until the advances made by the state for the particular project have been liquidated or amortized.

The Port Authority has refunded and retired its entire issue of Midtown Hudson Tunnel notes, and is seeking to have the Public Works Administration cancel the existing loan agreement and make a grant not to exceed \$4,780,000 in aid of the tunnel's construction. Pursuant to its refunding program, the Port Authority has also refunded the following bonds, acquired for retirement, which, with the three other issues below mentioned, constituted its funded debt as of November 30, 1935, adjusted to reflect the cancellation of \$14,800,000 Midtown Hudson Tunnel notes on December

20, 1935, and the sale of \$16,500,000 general and refunding bonds on December 11:

	Outstanding	Acquired and pledged
Series A (Arthur Kill Bridge) Series B (Washington Bridge) Series C (Bayonne Bridge) Series D (Inland Terminal) Series E (Holland Tunnel)	\$12, 200, 000 48, 420, 000 8, 861, 000 14, 820, 000 46, 008, 000	\$5, 643, 00 1, 580, 00 3, 139, 00 1, 180, 00 992, 00

On the same date there were outstanding general and refunding bonds, first series, 4 percent, due 1975, of \$45,331,000, and of second series, 33/4 percent, due 1965, of \$16,500,000, and series F bonds (Wash-

ington Bridge) of \$2,500,000.

By appropriate legislation enacted in 1934 and 1935, claims 66 between New Jersey and the Port Authority were adjusted and liquidated by the latter's payment of \$500,000 to the former. These claims arose from advances for the George Washington Bridge, Port Authority's undertaking to bear the cost of certain highway construction, and other items.

The annual reports of the Port Authority, submitted to the governors and legislatures of New York and New Jersey, contain statements of its progress, plans, activities, and financial conditions. As here shown, all its income, revenues, and receipts are derived from the following sources: (a) Toll charges from all of its bridges and tunnels; (b) rentals of Inland Terminal No. 1 paid by railroad carriers; (c) rentals from tenants of the upper floors; (d) rentals from real estate pending its use in connection with the comprehensive plan; (e) interest from securities in which sinking, reserve, and other funds are invested; (f) revenue from operation of a bus line over the Goethals Bridge; (g) interest on bank balances; (h) miscellaneous income such as rental of telephone ducts, sales of gasoline, towing, and tire-changing charges; (i) state advances. The securities in which its several funds are invested are bonds of New York and New Jersey municipalities; it also holds bonds issued by itself. Its gross income and net income, as so shown, were as follows:

	Year	*	Gross incom	e Net income
1931 1932 1933			\$7, 367, 288.3 10, 270, 699.5 10, 134, 638.5	2 3,000,000.

The functions of the Port Authority, as prescribed by the states' compact and statutes, are exercised by twelve commissioners, half of whom are appointed from among the resident voters of each state as their respective legislatures determine. The Commissioners take an oath of office and may be removed only upon

charges and after a hearing—in the case of New York, by the governor; in the case of New Jersey, by the state senate. Their actions are binding only after approval by a majority and the lapse of a specified period after the minutes of each meeting have been transmitted to the two governors, who have a veto power over the acts of the commissioners from their respective states. The commissioners constitute a board for the purpose of doing business and may adopt suitable bylaws for its management.

The Port Authority's facilities are subject to the jurisdiction of public service, utility, and similar state commissions in the same manner as those of a private corporation. Its bonds and certain obligations are legal investments for fiduciaries in both states, and for the protection of public funds deposited by it; the statutes of both states authorize financial institutions to give it undertakings

with sureties of its approval or securities as collateral.

The Port Authority has power to make investigations in connection with its planning for port improvement, and to issue subpoenaes to residents and property owners of New York, failure to comply being punishable upon the Port Authority's applica-

tion to the Supreme Court. Its authorized rules for the regulation of port affairs are enforceable by mandamus, injunction, or other appropriate relief, which actions are entitled to a preference over all New York civil cases. It may institute or intervene in proceedings before the Interstate Commerce Commission, state public utility commissions, and like bodies or any other Federal, state, municipal, or local authority for the adoption and execution of physical improvements, changes in methods or rates of transportation, warehousing, docking, and lightering. It may condemn and take property through legal proceedings.

The Port Authority has no stock and no stockholders, and is not owned by any private persons or corporations. Its projects are all operated in the interest of the public, and no profits inure to the benefit of private persons. Its properties and bonds or other securities issued by it are exempt by statute from state taxation. In Public Resolution 66, 67th Congress—H. J. Resolution 337—Congress declared that its activities under the comprehensive plan "" will the better promote and facilitate compares between

the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation." Certain statutes of New York and New Jersey relating to the various projects of the Port Authority recite that they are:

two states, for the increase of their commerce and prosperity and for the improvement of their health and living conditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance and operation and in carrying out the provisions of law relating to the said

[bridges and tunnels] and shall be required to pay no taxes or assessments upon any of the property acquired by it for the construction,

operation and maintenance of such

The States of New York and New Jersey obligated themselves to the payment of the Port Authority's administrative expenses each in the amount of \$100,000 a year until its revenues were adequate to meet them, and prohibited the incurring of obligation for salaries, office, and other administrative expenses prior to the making of such appropriations. Since 1928 employees of the Port Authority who were transferred from New York state service and were members of the state retirement system, might continue in that system. Since 1935 all employees are permitted to join it.

Montgomery B. Case was employed by the Port Authority from April 1, 1927, to December 31, 1932, as a construction engineer. He took an oath of office, was provided with a place of business and staff by the Port Authority, and had regular office hours, agreeing, however, to devote extra time to his duties when necessary

without extra compensation. During 1931 he was executive head of the Port Authority's construction division under the

70 supervision of its chief engineer, and had direct charge of all construction forces working on the Washington and Bayonne Bridges and the Holland and Midtown Hudson Tunnels, making frequent reports to the chief engineer. He had no outside office or business connection and did no engineering work for anyone else. His name was on the pay roll of the Port Authority, which he was required to sign with other employees. In 1931 he received a salary of \$16,000, which the Commissioner included in his taxable income

for that year.

Philip J. Gerhardt has been employed by the Port Authority since May 7, 1931, as industrial consultant. He took an oath of office, was provided with a place of business and staff by the Port Authority, and had regular office hours, agreeing, however, to devote extra time to his duties when necessary without extra compensation. During 1933 his duties comprised the designing of the Inland Terminal No. 1, from an operations standpoint, and its operation and rental under the supervision of the Port Authority's general manager, to whom he submitted monthly time reports of his work. He had no outside office or business connection. His name was on the pay roll of the Port Authority, when he was required to sign with other employees. In 1933 he received a salary of \$8,137.50, which the Commissioner included in his taxable income for that year.

E. Morgan Barradale was a member of the staff of the New York-New Jersey Interstate Bridge and Tunnel Commission from its organization in 1919 until its merger with the Port Author-

ity on May 8, 1930, and has since been employed by the Port Authority as superintendent of tunnel operations. He took an oath of office at the time of his employment by the Commission, was provided with a place of business and staff by the Port Authority, and had regular office hours, agreeing, however, to devote extra time to his duties when necessary without extra compensation. During 1933 he had charge of the operation and maintenance of the Holland Tunnel and of the Port Authority employees operating it under the supervision of the assistant general manager in charge of operations, to whom he made reports of his work and time. He had no outside office or business connection except his office and position as director and president of a building and loan association. His name was on the pay roll of the Port Authority, which he was required to sign with other employees. In 1933 he received a salary of \$10,174.97, which the Commissioner included in his taxable income for that year.

Billings Wilson has been employed by the Port Authority since July 1, 1922, as assistant general manager. He took an oath of office, was provided with a place of business and staff by the Port Authority, and had regular office hours, agreeing, however, to devote extra time to his duties when necessary without extra compensation. His duties comprise administrative work in the office and inspection work in the field under the supervision of the general manager, to whom he submitted reports on various matters as required. He had no outside office or business connection. His name was on the pay roll of the

the Port Authority, which he was required to sign with other employees. In 1933 he received a salary of \$14,625 from the Port Authority, which the Commissioner included in his tax-

able income for that year.

John J. Mulcahy has been employed by the Port Authority since June 1, 1928, as assistant general manager. He took an oath of office, was provided with a place of business and staff by the Port Authority, and had regular office hours, agreeing, however, to devote extra time to his duties when necessary without extra compensation. During 1932 he supervised the Port Authority's entire personnel and acted as administrative assistant to the general manager under supervision of the latter, to whom he submitted reports on various matters as required. He had no outside office or business connection. His name was on the Port Authority's pay roll, which he was required to sign with the other employees. In 1932 he received a salary of \$10,950, which the Commissioner included in his taxable income for that year.

Opinion

STERNHAGEN. The question raised by this proceeding is whether the compensation received by an officer or employee of the Port Authority for services regularly rendered is subject to Federal income tax. The compensation was held constitutionally immune in Leon Moisseiff, 21 B. T. A. 515, and Robert Carey, 31 B. T. A. 839. Modjeski, an engineer of the Port Authority, was held taxable as an independent contractor. Commissioner v. Modjeski, 75 Fed. (2d) 468; certiorari denied, 295 U. S. 764. Commissioner v. Ten Eyck, 76 Fed.

the court expressly dealt with the Port Authority as of the same character. Commissioner v. Harlan, 80 Fed. (2d) 660, held immune the pay of an attorney of the Golden Gate Bridge & Highway District of San Francisco. Thus the question might be regarded as fairly well closed for this Board. But the Government says that for one reason or another each of those decisions lacks authoritative force to control the general question. It now presents these cases as complete both in facts and argument to serve as a definitive test. The evidence has been stipulated at length and also given in the testi-

mony of Port Authority employees.

The Port Authority is organized for and operating in the traditionally sovereign function of protecting, improving, and developing the Port of New York; and all its activities are directed to and are incident to that end. The dual nature of our government requires that the state and Federal governments shall be adjusted to each other to produce the greatest power for each with the least friction. The problem is not one of logical or legal absolutes, but of the promotion of a smooth practical interrelation of the two in recognition of their several sovereign necessities. Neither may so exercise its powers as to encroach upon the necessary or traditional sovereign functions of the other; and, since this doctrine is firmly established, it is not to be supposed that either is attempting to do so. The revenue act and its broad definition of income may not be regarded

as an attempt to tax the salary of the state executive although it may be literally within its terms. The Attorney General expressed this opinion in 1919, 31 Op. A. G. 441. The immunity of such salary from Federal tax is inherent in the sovereignty of the state. If it inures to the benefit of the individual, this is but collateral to the effect upon the state. To him, it is not a matter of

· independent personal right, but of perquisite of his office.

We are bound, when the Circuit Court of Appeals has held, in affirmance of our own earlier decisions, that the Port Authority and other organizations similarly engaged are performing a traditionally sovereign function, to apply the doctrine and hold the pay of its employees to be exempt from Federal tax. Commissioner v. Ten Eyck, supra; Leon Moisseiff, supra; Robert Carey, supra; Commissioner v. Harlan, supra. That the Ten Eyck case is regarded by the court as a holding that port development is a traditionally sovereign function is fortified by its more recent opinion in Brush v. Commissioner, — Fed. (2d) — (C. C. A., 2d Cir., July 13, 1936).

The argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation or is carried on under an interstate compact requiring Congressional consent. The argument is not new. It was considered and rejected in Commissioner v. Harlan, supra, and there is enough in the opinion and briefs in the Ten Eyck case to show that the Federal power over interstate commerce and navigation were not

overlooked. But to deal with the issue squarely, we are of opinion that the development of the port may not be interfered with by Federal tax even though the interstate and foreign commerce

passing through the port and upon its highways, bridges, and tunnels is subject to Federal regulation, even though the navigable waters under its bridges and over its tunnels are under Federal control, and even though the underlying interstate compact required the consent of Congress. To this may be added that there ' is no reason to regard the revenue act as a means used by Congress to regulate interstate commerce, to control navigation, or as an implied condition of its consent to the interstate compact. Cf. United States v. Butler, 297 U. S. 1. Such a view, if accepted, might go so far, for example, as to subject the employees of a state highway department or public service commission to Federal tax under the present law. It would mean that in making an interstate compact the states would be surrendering the very sovereignty which the Constitution takes for granted and upon which the compact is founded-and this, not directly by an express condition in the resolution of consent, but by an implied relation between the general terms of the consent and the broad terms of the revenue act. Is it to be supposed that in the blanket consent to interstate compacts for crime prevention (U. S. C. A., title 18, § 420) lurks a power to tax the state police officers who are employed under the compact?

Relying upon Commissioner v. Powers, 68 Fed. (2d) 634, the argument is made that the Port Authority is engaged in proprietary functions for profit with the effect of withdrawing sources of revenue from the Federal taxing power. This is said in respect of the rents

from the Inland Terminal Building, more particularly the upper stories privately occupied; of the tolls from the bridges and tunnels; and of the destruction of private ferry competition. If these were independent profit-making ends in themselves, the argument would be more engaging. But these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of improving the port and terminal facilities of the port district. Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144. The Inland Terminal Building was not constructed to produce rent as a profit on investment, but to provide a more efficient terminal and thus expedite traffic and relieve highway congestion. The bridge and tunnel tolls and the reduction of traffic on the private ferries were incidental to the governmental project of providing highways to facilitate traffic and reduce port and harbor congestion in the common public interest. It has not heretofore been suggested that the maintenance of a free state highway was a proprietary function subject to Federal tax because it diminished or destroyed the traffic on an existing private toll road. State public school teachers are not regarded as taxable because a new public school may reduce the taxable profits of an existing private school. The essential question of the preservation

of the state's sovereign powers in the interplay of our dual government may not be lost sight of by a pursuit of each detail of the method of exercising it as if it stood alone with a different history and a different purpose. Burnet v. Coronado Oil & Gas Co., 285 U. S. 393; University v. People, 99 U. S. 309; G. C. M. 13745, XIII-2

C. B. 76. Cf. Trinidad v. Sagrada Orden de Predicadores, 263 U. S. 578. It may be doubted whether the Port Authority has any right to engage in business for the sole or primary purpose of making profit; but not until it does so will the effect upon

its tax immunity require consideration.

We hold that the Port Authority is engaged in the performance of a sovereign function of each of the states of New York and New Jersey and that the compensation received by its employees is exempt from the Federal income tax. This is primarily because of the constitutional right of the state to be free from Federal interference in the exercise of its sovereign powers. We hold further that even if the Port Authority's functions are not constitutionally immune from interference by Federal taxation, the power of the Federal Government to regulate commerce and control navigable waters has not been exercised by Congress through the imposition of tax in the general provisions of the revenue act, nor has such tax been provided for as an implied condition of consent to the interstate compact.

Reviewed by the Board.

Judgment will be entered for the petitioners.

MELLOTT dissents.

78 Before United States Board of Tax Appeals, Washington

Docket No. 77375

PHILIP L. GERHARDT, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

In accordance with the Board's report, promulgated October 28, 1936, it is

Ordered, adjudged, and decided that there is no deficiency in income tax for 1933.

Enter:

(Signed) JOHN M. STERNHAGEN, Member.

(Entered Oct. 31, 1936.)

79

Before United States Board of Tax Appeals, Washington

Docket No. 77377

BILLINGS WILSON, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

In accordance with the Board's report, promulgated October 28, 1936, it is

Ordered, adjudged, and decided that there is no deficiency in income tax for 1933, and no penalty.

Enter:

(Signed) JOHN M. STERNHAGEN, Member. (Entered Oct. 31, 1936.)

80 Before United States Board of Tax Appeals, Washington

Docket No. 80769

JOHN J. MULCAHY, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

In accordance with the Board's report, promulgated October 28, 1936, it is

Ordered, adjudged, and decided that there is no deficiency in income tax for 1932, and no penalty.

Enter:

(Signed) JOHN M. STERNHAGEN, Member.

(Entered Oct. 31, 1936.)

81

Before United States Board of Tax Appeals

Docket No. 75816

Docket No. 77375

Docket No. 77376

Docket No. 77377

Docket No. 80769

[Titles omitted.]

Motion to amend findings of fact and for specific findings of fact

Now comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and moves that the Board amend and correct its findings of fact promulgated herein on October 28, 1936, in accordance with the facts of record, and that the Board make specific findings of fact as set forth below; and in support of said motion shows:

1. That the parties, for the purpose of presenting test cases which would be determinative of the tax liability for all employees of the Port of New York Authority, submitted these cases in part upon a Stipulation of Facts, in which were set forth certain of the facts as to the creation, operation, maintenance, and sources of revenue

of the Port Authority.

Notwithstanding the importance and relevance of the facts contained in said Stipulation to the issues herein, the Board has omitted

and failed to make findings of numerous facts set forth in de-83 tail in said Stipulation of Facts, upon which the parties relied as pertinent to, if not controlling of, said issues. Certain of said facts are set forth below as a part of the respondent's motion with the request that the Board make specific findings of fact in

accordance therewith.

2. That said Stipulation of Facts did not and was not intended by the parties to contain all of the material facts, and many relevant and material facts upon which the parties particularly relied were contained in the eighteen exhibits to said Stipulation, but which facts were too extensive and voluminous to set forth in full in said Stipulation of Facts. Included as a part of said exhibits were The Legislative Reports, The Commission Reports, The Port Authority Statutes, The Compact, and the Comprehensive Plan, all of which contained vital and controlling facts as to the conception, organization, powers, duties, and legal functions of the Port Authority. Included as a part of said eighteen exhibits were the Annual Reports of the Port Authority covering its work, its function, and its methods of operation and maintenance throughout its entire history.

Notwithstanding the importance and relevance of all said documents to the issues herein, the Board has almost completely ignored the facts contained therein, and has failed to make findings as to facts therein contained which are pertinent and germane to the issues herein, if not controlling of said issues. Certain of the facts which the Board has thus failed to find and upon which respondent relies

as determinative of the issues herein are set forth below as a part of this motion, with the request that the Board make

specific findings of fact in accordance therewith.

3. That the parties for the same reason above set forth, introduced voluminous testimony of witnesses as to the design, purposes, construction and actual operation of certain facilities of the Port Authority, more particularly as to the Commerce Building and In-

land Terminal No. 1. Included as a part of said testimony were numerous stipulations of counsel as to facts formerly controverted, which facts are relevant and material to the issues herein. Certain concessions of facts were made by counsel for the taxpayers, in particular as to the competition of the various facilities of the Port Authority with the Ferry, Terminal, and Transportation Companies, their former profitable operation and the large extent to which their revenues were reduced by competition with the Port Authorities facilities, and the extent to which such competition had effected the withdrawal of revenues from Federal taxation.

Notwithstanding the importance and relevance of said testimony and said stipulations and concessions of counsel to the issues herein, the Board has almost wholly ignored said testimony, stipulations, and concessions of counsel, and has failed to make adequate findings of fact in regard thereto. Certain of the facts which the Board has thus failed to find and upon which respondent relies as determinative of the issues herein are set forth below as a part of the respondent's motion, with the request that the Board make specific

findings of fact in accordance therewith.

4. That the Board in its findings of fact has omitted numerous facts as to the original reasons for and purposes of the Commerce Building as shown by the evidence (Annual Report, 1925, p. 18, 24); as to its location (Ex. N); as to objections to its erection and location (Ex. N); as to the failure of the Port Authority to procure the consent of the City of New York to its erection (Ex. N); as to its liability to the City of New York for the payment of municipal taxes thereon, and as to its efforts to compromise said tax liability by payment of an annual stated sum in lieu thereof (Tr. 384); as to the relation of the Port Authority to the several carriers leasing space in the Commerce Building (Ex. P); as to the terms and conditions under which Inland Terminal No. 1 was leased to the eight carriers (Ex. P); as to the relative amount of space and relative revenues produced by the Inland Terminal as compared to the remainder of the Commerce Building (Annual Report, 1930, p. 44; Tr. 287-290, 335); as to the competition admittedly furnished by the Commerce Building to like structures in the neighborhood (Ex. N, p. 39); and as to other facts in connection with the operation of said Commerce Building, its method of rental, its method of advertising, etc., all of which facts are relevant to the issues herein.

Notwithstanding the importance and relevance of said testimony and other facts of record, the Board has failed to make adequate findings of fact in regard thereto. Certain of the facts which the

Board has thus failed to find and upon which respondent relies as determinative of the issues herein are set forth below as a part of respondent's motion, with the request that the Board make specific findings of fact in connection therewith.

5. That the Board's findings of fact as to the authority for construction and operation of the several bridges and tunnels of the Port Authority are wholly inadequate and insufficient in that it has

failed to find as a fact that the authority of the legislatures of the States of New York and New Jersey were legally insufficient to permit the Port Authority to erect and operate said interstate bridges and tunnels, and in failing to find as a fact that before the Port Authority could erect any of the bridges and tunnels which it now operates over interstate navigable waters, it was necessary for the Porth Authority (or in the case of the Holland Tunnel, its predecessor) to procure the consent of the Congress of the United States to the erection and operation of said interstate bridges and tunnels. and that the Port Authority did, in fact, procure the consent of Congress to the construction and operation of said interstate bridges and tunnels, showing the conditions and limitations upon said consent of the Congress. The facts which the Board has thus failed to find and upon which respondent relies as determinative of the issues herein are set forth below as a part of respondent's motion with the request that the Board make specific findings of fact in accordance therewith.

6. That the Board in its findings of fact on pages 8, 10, 11 and 12 has made numerous and extensive findings as to the 87. congestion of streets and highways in and around the City of New York, as to traffic inconveniences and dangers in said area, as to freight congestion and transportation conditions therein, as to commutation and passenger traffic conditions in and around the City of New York, as to living costs in and around the city, as to competition of the Port of New York with other ports, and in general as to the necessity of the Port Authority engaging in the remedying of the above conditions. All of said findings of fact are utterly irrelevant and immaterial to the issues herein. The ultimate issue is not what constitutes the public functions of the states based upon public convenience or necessity, but what are the sovereign or governmental functions of the states which are protected by constitutional immunity. The Board's findings should be amended accordingly.

And respondent further moves that the Board make specific findings of fact relevant and material to the issues herein in substance as follows:

1. The report of the Joint Commission of New York and New Jersey rendered in 1919 and known herein as the "Joint Report with Comprehensive Plan and Recommendations," contained a summary of the purposes and problems of the two states in creating the Port of New York Authority, and of the physical needs and objectives of the two states. That report stated in part:

"A complete reorganization of the railroad terminal system
88 is the most fundamental physical need of the Port of New
York. * * The plan recommended calls for improving
and opening up for joint use the existing belt line links in New
Jersey and constructing other belt lines along navigable New Jersey
waters and further inland; building similar marginal railroads
along navigable waters adjacent to Brooklyn, Queens, Staten Island,

and the Bronx, and utilizing with them the Long Island Railroad and New York Connecting Railroad to form a belt line system in New York; connecting the New Jersey and New York belt systems at first by a car ferry and ultimately by tunnel under the upper bay; · operating all of these lines jointly, and operating jointly through new joint railhead terminals all railroad marine service not replaced . by other service; and building an underground railroad system carrying special electrically operated cars connecting with all the railroads of the Port, serving virtually all of Manhattan and enabling the railroads to discontinue the pier stations and release the waterfront to other uses.

"This remodeled terminal railroad system bringing every railroad of the port to every part of the port * * *, constitutes the comprehensive plan which the Commission recommends for formal

adoption by the two states" (Ex. B, pp. 2 and 3).

2. The compact of April 30, 1921, provided for the organization of the Port Authority and conferred on it certain jurisdiction and powers, but provided that such powers should not be exercised until the legislatures of the two states approved of a comprehensive plan for the Port. The comprehensive plan was adopted by the two legislatures on February 24, 1922, and was the same comprehensive plan which was recommended by the Joint Commission for formal adoption by the two states (Ex. F).

3. The compact contains certain recitals to the effect that the objects sought are "A better coordination of the terminal, transportation and other facilities of commerce in, about and through the Port of New York." The compact then confers upon the Port Authority certain "Powers and Jurisdiction" therein enumerated as

"To purchase, contract, lease and/or operate any terminal or transportation facility within said district and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure same by bonds or by mortgages upon any property held or to be held by it." (Art. VI.)

And such additional powers as may hereafter be delegated to it by

the legislatures of the two states (Art. VII).

The compact also sets forth certain specific restrictions and limitations upon the Port Authority as follows:

(a) The Port Authority shall have no power to pledge the credit

of either state (Art. VII).

(b) The Port Authority shall have no power to take any property owned by either state or by any county, city or other subdivision of either state without the consent of such state or subdivision (Art. VI).

(c) All facilities of the Port Authority are expressly subject to the jurisdiction and control of the Public Utilities Commission of both states to the same extent as a private corporation (VIII).

(d) The Port Authority has no authority or control over the right of any municipality in the Port District to develop its own port and terminal facilities (Art. IX).

(e) The plans and projects of the Port Authority must be duly approved by the legislatures of both states before they become effect-

ive or binding (Art. XI).

(f) The right to veto any action of the Port Authority is expressly reserved to the legislatures and governors of both states (Art. XVI).

(g) The Port Authority is prohibited from incurring any obligation or expense prior to the appropriations made therefor by the legislatures of both states (Art. XVII).

(h) Rules and regulations for conduct of navigation made by the Port Authority must be approved by the legislatures of both states before they become binding and effective (Art. XVIII).

91 (i) The Port Authority has no power to provide or impose penalties for violations of its rules and regulations, such power being reserved to the legislatures of the two states (Art. XIX).

4. The Comprehensive Plan provides under Section 8 in part as

follows:

"Sec. 8. The Port of New York Authority is hereby authorized and directed to proceed with the development of the Port of New York in accordance with said Comprehensive Plan as repidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either State to effectuate the same, except the

power to levy taxes or assessments."

5. From an examination of the text of the comprehensive plan and from the "Outline Summary Map of the Comprehensive Plan" attached to the Joint Report, Exhibit B, Map 1, it is apparent that it contemplated primarily the coordination of already existing railroad and terminal facilities and was limited to the construction and operation of certain tunnels, bridges, and belt lines in connection with such facilities. An analysis of the provisions of the comprehensive plan discloses that the projects embraced in it were as follows:

(a) A railroad tunnel or tunnels connecting the transcontinental railroad lines terminating in New Jersey, with the Long
Island Railroad, the New York Connecting Railroad and the
New York Central and New York, New Haven and Hartford Rail-

roads in Brooklyn and the Bronx (1924 Report, p. 46).

(b) A bridge or tunnel across the Arthur Kill River to connect

New Jersey and Staten Island.

(c) A bridge or tunnel from New Jersey to Manhattan to occommodate the automatic electric underground system connecting the railroads in New Jersey with the railroads on Manhattan and providing for the bringing of standard railroad cars into Manhattan.

(d) Certain railroad belt lines specifically enumerated therein, and union terminal stations in connection with the automatic electric

system (Comprehensive Plan, Ex. E, pp. 36, 37, and 42).

6. It is further apparent that the Comprehensive Plan contemplated that the objectives sought therein might be accomplished either by inducing and compelling the transportation and terminal companies to undertake such projects themselves, or by the Port Authority undertaking said projects by the purchase or lease of existing facilities and by constructing and operating additional ones. This is clear from the recitals in the Compact, and from the manner in which the "principles to govern the development" as set forth in the Compre-

hensive Plan are made to apply equally to the railroad and 93 terminal companies undertaking such projects. This is also the plain interpretation placed upon the Comprehensive Plan by the Port Authority itself in its annual reports to the legislatures as to its activities and functions. See 1924 Report, pages 6, 7, and 8.

7. An examination of the Annual Reports of the Port Authority for the first three years discloses that its activities were almost exclusively in connection with railroad and terminal facilities, and followed some three related lines:

1. Efforts to compel the four railroads concerned to link up and operate as a joint facility, Belt Line No. 13, which the Port Authority repeatedly designated as "the most important item in the Port Authority Commission's work," and as "the first step in the effectuation of the Comprehensive Plan." 1923 Report, page 10; 1924 Report, page 11; 1922 Report, page 11.

2. Efforts to connect existing links and to commence construction of new sections comprising Belt Line No. 1 which the Port Authority termed "The keystone of the arch of the Comprehensive Plan."

1923 Report, page 16; 1924 Report, page 13.

3. Field studies of railroad pier station operations, terminal operations, store door deliveries and collections, marginal railroad lines, methods of lighterage and car float operations, and traffic studies of freight movement across the Hudson River, which studies "constituted essential information needed in determining the 'Economic Proof' related to Belt Lines Nos. 1 and 13 and their relation to the tunnel under the upper bay from Greenville to Bay Ridge and the Middle Belt Line No. 1 in New York." 1922 Report, pages 8, 9, and 10: 1923 Report, page 7.

8. During the year 1930 by joint legislation of the two states, the New York, New Jersey Interstate Bridge and Tunnel Commission was merged with the Port Authority, and the Port Authority was vested with the control, operation, and maintenance of the Holland running under the Hudson River from the New Jersey Shore to Manhattan. This tunnel was financed on the part of the State of New Jersey by a bond issue and on the part of the State of New York by direct appropriation.

By joint legislation of the two states in 1931 the foregoing legislation was abrogated, and it was enacted that the construction, operation, and maintenance of such bridges and tunnels across the Hudson River should be placed under the Port Authority to the

end that the tolls and revenues therefrom shall be applied to the cost of construction, maintenance, and operation of said bridges and tunnels as a group," but that said control, operation, tolls, and other revenues of the Holland Tunnel should vest in the Port Authority only upon the payment to each of the two states of the sums contributed by each to its construction with interest thereon (Ex. E, pp. 290, 294).

The tolls and revenues of the Holland Tunnel were pledged to secure the repayment of such advances by the states and the

bonds or other obligations incurred thereon (Ex. E, p. 296).

9. A complete summary and statement of the nature of the activities of the Port Authority from its organization up to 1927 is found in the Annual Report for 1926, pages 5 to 9. This summary gives the interpretation placed upon its own functions by the Port Authority and makes it perfectly clear that the Port Authority regarded its functions as divided into two categories, viz.:

1. "Development and Protection of the Port under the Compre-

hensive Plan."

2. Construction and operation of interstate bridges.

The Annual Report for 1926 not only so states but the report itself is divided into those two categories, part one being headed "Development and Protection of the Port under the Comprehensive Plan" and part two being headed "Relating to Bridges" (pp. 13 and 47).

Moreover, it is clear that none of these bridges were contemplated by or related to the original Comprehensive Plan. In its report for 1926 the Port Authority does not mention the Comprehensive Plan in relation to these bridges, and there is no reference whatever to the

Comprehensive Plan in part two of this Annual Report which deals with the bridges. On the contrary, the first sentence of part two makes it plain that these bridges were a separate and

distinct undertaking, for its states:

"By the direction of the legislature of the two states the Port

Authority is engaged in four bridge enterprises."

This statement clearly refers to the four separate enabling acts above set forth, and the four bridges are named immediately thereafter, to-wit: two bridges over the Arthur Kill River; the Hudson River Bridge; and the Kill Van Kull Bridge (p. 47).

It is equally clear that this division by the Port Authority of its functions into these different categories was not inadvertent. Exactly the same division is made by the Port Authority in its Annual Report for 1927 (pp. 13 and 43). Moreover, under Section 1, of these two annual reports designated "Development of the Port, etc," no reference whatever is made to any of the "Interstate Bridges."

A third category or division was added to the activities of the Port Authority in the 1927 Report entitled "Suburban Transit" (p. 58). This category was added pursuant to Chapter 277, Laws of New Jersey for 1927 (Ex. E, p. 201), which directed the Port Authority to make a study and report to the legislature on the transit facilities

of the Port. According to the Port Authority's own report this is the first time that the Port Authority took any active interest in the transportation of passengers or transit facilities in the Port District.

These same divisions of the Port Authority's activities were again made in the Annual Report for 1928 (pp. 13, 35, 45, 59). Almost identical divisions of its activities are made by the Port Authority in all of its succeeding Annual Reports up to and including 1933.

10. From the several annual reports of the Port Authority from 1922 to 1928 it is clear that under Section 1, "Development and Protection of the Port under the Comprehensive Plan," the Port Authority had two classes of work, viz:

1. Development-Limited largely to belt lines and railroad terminals and studies for Union Inland Terminals in connection there-

with (1928 Report, pp. 13 to 23).

2. Protection of the Port-Limited to interventions and appearances in proceedings before the Interstate Commerce Commission and other regulatory bodies in which the Port was concerned (1928 Report, pp. 25 to 34).

11. During the years in question the work of the Port Authority

was confined to the following:

BRIDGES AND TUNNELS

(1) Operation of the Arthur Kill Bridges, known as Goethal's Bridge and Outerbridge Crossing. These bridges were completed in 1928 at a cost in excess of \$17,000,000.00. They are interstate vehicular bridges, one between Perth Amboy, New Jersey, and Staten Island, and the other between Elizabeth, New Jersey, and Staten Island. From the commencement of operation up through the years in question the joint financial operations of these two bridges resulted as follows:

1000 -	
1928—Profit	A080 000
1929—Loss	*272, 676, 75
1930—Profit	33, 340. 21
1931—Profit	76, 683, 54
1932-Loss	40, 673. 37
1933—Loss	187, 272, 17
(Stip., p. 41).	295, 534, 46

The losses during 1932 and 1933 were due, according to the Port Authority's Annual Reports, in part to "General business depression seriously affecting the gross revenues" but "The larger portion of this decrease" was "due primarily to a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52; 1933 Report, p. 51. See also 1930 Report, p. 54).

These bridges were operated in direct competition with the Perth Amboy Ferry. The opening of the bridges forced the Perth Amboy Ferry to reduce its toll charges, and in 1932 the opening of the Outerbridge Crossing forced "a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52).

The other ferries, the Tottenville and Elizabeth ferries were both forced to "curtail services during the past year and will probably

be less of a competitive factor next year" (1929 Report, p. 46).

Another ferry running between Carteret, New Jersey, and
Staten Island has gone out of business since these bridges were

opened (Annual Report, 1929, p. 46).

(2) Completion of construction and continued operation of the Kill Van Kull (Bayonne Bridge). This bridge was completed in 1931 at a cost of \$13,000,000.00. It is an interstate vehicular bridge between Bayonne, New Jersey, and Staten Island, New York. During the years in question the operation of this bridge resulted as follows:

1931Profit	\$25, 400. 29
1932—Loss	101, 466. 11
1933—Loss	240, 890. 18
(Stin n 55)	*

The losses in 1932 and 1933 were attributed by the Port Authority in its Annual Report for 1933, page 50, to: "the general depression has continued to be responsible for the decline in passenger car traffic primarily on Sundays and holidays" (see 1931 Report, p. 12).

This bridge was operated in direct competition with privately owned ferries across the Kill Van Kull and resulted in compelling the ferry companies to reduce their toll charges (Annual Report, 1932, p. 48; 1931 Report, p. 12).

(3) Completion of construction and continued operation of George Washington Bridge.—This bridge was completed in 1931 at a cost of

\$57,000,000.00. It is an interstate vehicular bridge across the Hudson River from Fort Lee, New Jersey, to Manhattan.

During the years in question the operation of this bridge resulted as follows:

	\$504, 264, 08
1931—Profit	
1932—Profit	1, 473, 363. 61
	1, 142, 770, 42
1933—Profit	1, 142, 110, 12

This bridge was erected in full anticipation that it would compete with the privately owned ferries across the Hudson River (Annual Report, 1926, pp. 14 to 16; Tr. 351, 352). Studies and clockings were made by the Port Authority of the traffic over the ferries for the purpose of determining how much of their traffic the Port Authority could reasonably expect to take away (Annual Report, 1925, p. 14; Tr. 456).

It is conceded as a fact by petitioners that these ferries were private companies or subsidiaries of the railroad companies operating across the Hudson; that the facilities operated by the Port Authority are in competition with those ferries and have reduced their traffic and their earnings, and that the earnings of these ferry companies were subject to Federal taxation as private corporations (Tr. 368, 369, 364).

It is also conceded that the business of these ferry companies not only has diminished "as a result of the furnishing of facilities like the Holland Tunnel and George Washington Bridge but they will probably continue to diminish" (Tr. 351). That the bridges and tunnels were built with this expectation and the bonds of the Port Authority were sold to the public upon the expectation of

"an increased revenue that was expected to come from people

who formerly used the ferries" (Tr. 27, 51).

It was admitted by the taxpayer, Billings Wilson, Assistant General Manager of the Port Authority, which had made studies of the traffic and revenues of these ferry companies for a number of years (Annual Report, 1926, p. 51; Tr. 434, 435) that these ferry companies were profitable undertakings and had earned their capital investments many times prior to the Port Authority coming into the field (Tr. 432).

It is further conceded that the furnishing of vehicular tunnels and bridges by the Port Authority "may ultimately result in the

complete wiping out of the ferries" (Tr. 352);

The opening of the George Washington Bridge compelled the 125th Street Ferry and Dyckman Street Ferry to "reduce their toll charges approximately 30% on passenger vehicles in an effort to

retain traffic" (1931 Report, p. 49).

It is further admitted by the Port Authority that the George Washington Bridge is also in competition with the railroad companies by diverting to bus lines using the bridge substantial numbers of the "commuters who formerly used the railroads" (Annual Report, 1933, pp. 47, 48).

It is further admitted by the Port Authority that it has taken steps to suppress competition with its facilities across the Hudson River by opposing the granting of franchises or permits to a private company to erect another bridge across the Hudson to serve

Manhattan (Annual Report, 1933, p. 28).

(4) Operation of the Holland Tunnel—This tunnel was purchased and taken over from the Interstate Bridge and Tunnel Commission March 1, 1931, and has been since operated by the Port Authority as its own property (1931 Report, p. 57). It is an interstate vehicular tunnel running from Jersey City, New Jersey, to Manhattan under the Hudson River. During the years in question the operation of this tunnel resulted as follows:

 1981—Net Profit (Annual Report, p. 74)
 \$3,031,987.89

 1982—Net Profit (Annual Report, p. 74)
 \$2,605,076.96

 1983—Net Profit (Annual Report, p. 76)
 \$2,440,987.15

It is conceded by the taxpayers that the operation of the Holland Tunnel by the Port Authority is in direct competition with private ferry companies across the Hudson River and that it has compelled them to reduce their toll charges and reduce their revenues in the same manner and to the same extent as has the operation of the George Washington Bridge as above set forth (Tr. 364, 368, 369). (See Annual Report, 1930, p. 51.)

(5) Since 1931 the Port Authority has been engaged in the construction of an interstate vehicular tunnel to extend from Wee-

hawken, New Jersey, to Manhattan Island, New York, at 38th Street, to be known as the Midtown Hudson Tunnel. It is de-

signed for the same general purposes as the other Hudson
River facilities of the Port Authority and it is conceded that
upon completion its operation will further reduce and diminish the traffic across the Hudson now served by the private ferry
companies and that the operation of this and the other Port Authority
facilities may ultimately result in the complete wiping out of such

ferry companies (Tr. 352).

12. Tolls are charged by the Port Authority for the use of all of its transportation facilities by the public including pedestrians (Stip.

89; 1931 Report, p. 49).

For the admitted purpose of increasing and stimulating the use of its facilities by the public and admittedly to divert traffic which formerly used the ferries across the Hudson (Annual Report, 1926, p. 51) the Port Authority has advertised its various bridges and tunnels extensively in magazines, trade journals and local newspapers.

(Stip. 93; 1931 Report, p. 48; Ex. S; Tr. 189).

It has distributed maps, descriptive pamphlets and other advertising matter designed to divert traffic to its facilities, through various tourist agencies, chambers of commerce and commercial organizations. Numerous specimens of such advertising were filed in evidence at the hearing, together with two traffic promotion programs adopted by the Port Authority for 1933 and 1934 (Exs. A and S; Tr. 189). Prior to the opening and operation of the Port Authority facilities this traffic was served by ferry companies and railroads—private carriers subject to Federal income tax—which as a result of the

104 competition of the Port Authority facilities, have suffered sub-

stantial losses of revenue (Tr. 364, 368, 369).

13. The great preponderance of the traffic over the Port Authority bridges and tunnels does not consist of trucks and commercial vehicles (1931 Report, p. 51). From 80 to 90 per cent of the vehicles using its facilities are passenger automobiles and vehicles. The following analysis of its traffic during the years in question as taken from the annual reports of the Port Authority shows the relative percentages of its traffic:

Analysis of traffic over Authority's facilities.1

		and T	unnel	G. W. Bridge			Arthu	r Kill E	Bayonne Bridge			
1	1931	1932	1933	1931	1992	1933	1931	1932	1933	1931	1932	1903
Automobiles Busses Trucks	: 80 . 03 . 15	.79 .03 .16	. 79 . 03 . 16		.90 .04 .04	. 88 . 06 . 04	.88 (1) .10	.87 (³) .11	. 85 (3) . 13		. 81 . 07 . 10	.7

¹ Figures from 1932 Annual Report, pp. 79, 80; 1933 Annual Report, pp. 82, 83. George Washington and Bayonne Bridges opened late in 1931 so no figures shown. Bicycles, motorcycles, etc., totaling is than 2%, excluded.
³ Less than 1%.

14. During the years in question the Port Authority has been enraged in completing the construction of and in operating the Commerce Building and Inland Terminal No. 1.

The Comprehensive Plan provided that certain universal inland terminals should be constructed in connection with an dto be served

by the automatic electric system (Ex. E, p. 42). Construction of the automatic electric system was found too costly and impracticable and was abandoned by the Port Authority in 1924, as stated in its Annual Report for 1924, page 18. The Port Authority thereupon planned to construct such terminals served by

motor trucks in lieu of the underground system (p. 18).

Studies were made of the nature and location of such inland stations. The number of floors above the street level, according to the official published report of the Port Authority, was determined by two factors: (a) the finding of streets which would "permit the maximum number of floors above the street" and (b) the capacity of the streets to serve the upper floors by vehicles (Annual Report, 1925, p. 18). This is wholly at variance with the testimony of the petitioner Wilson that the number of floors was fixed by the amount of additional revenues necessary to carry the investment (Tr. 402).

The building as constructed is fifteen stories in height and covers an entire block 800 feet long and 206 feet wide, and is generally known as the "Port Authority Commerce Building" (1933 Report, p. 61; Ex. Q). It has no physical connection with any railroad or other railroad facility. It is not on the waterfront nor is it served by any water transportation (Tr. 325; 1931 Report, p. 41). "This building houses Union Inland Station No. 1 * * jointly operated by all the railroads entering the Port District" (1933 Report, p. 61). The Inland Terminal is not used by two other railroads which enter the Port District, viz, the West Shore

Railroad, and the New York, Ontario and Western (Tr. 282). The basement and a large portion of the first floor are leased to eight railroads for use as a freight transfer terminal for a period of five years with options in the railroads to renew for nine additional five-year periods. The rent reserved is 10¢ per ton of freight handled with a proviso that if the net income from the entire building above debt charges and amortization exceeds \$60,000.00 per annum the rental will be reduced to 5¢ per ton (Ex. P). The eight railroads actually use and occupy only the first floor. The basement is occupied by the Railway Express Agency.

The remainder of the first floor is leased by the Port Authority to a bank, a barber shop, a cafeteria, beauty shop, and post office (Tr. 286). The second floor was designed as an exhibit hall known as "Commerce Hall." It is leased to various private persons for exhibition purposes such as the Ford Exposition in 1933 (Tr. 285). The upper thirteen floors were constructed for manufacturing, warehouse, office space, and other industrial purposes (Tr. 324, 332; 1933

Report, p. 61).

The space in the Commerce Building is divided as follows:

	Square feet
Office Space	152, 940
Manufacture and Loft Space	1, 842, 000
Freight Terminal purposes	282, 650
Stores (1930 Report, p. 44)	112, 200

The gross annual tonnage capacity of Inland Terminal No. 1 107 is 680,000 tons. The first year's operation resulted in a gross tonnage of 40,000 tons, and the second, year's operation was

about 65,000 tons (Tr. 287).

15. It is admitted by the Port Authority that one of the main purposes of the Inland Terminal was to "dry up" or eliminate the railroad pier stations on Manhattan Island and that it was expected that eventually all of these pier stations would be dried up by the establishment of like terminals by the Port Authority (1933 Report,

p. 24).

16. In order to attract tenants into the Commerce Building the Port Authority made a contract with Brown, Wheelock, Harris and Company to act as rental agent and handle the warehouse space in it (Tr. 332, 335). As such agent this company solicited tenants to come into the building (Tr. 291, 294). Certain tenants, notably the New York Planning Company and Wheel-Parts, Inc., formerly tenants in the Bush Terminal Building, were induced to move into the Commerce Building (Tr. 293-294). The United Cigar Stores Company, also a tenant of Bush Terminal Building, was contacted as a tenant but decided not to move into the building (Tr. 295). The Port Authority has made certain concessions in rentals in order to secure tenants for the building (Tr. 298-300). The Port Authority has admittedly "induced" tenants to move into the building by advertising its terminal facilities. It has also advertised the Commerce Building separately from any of its other facilities (Tr. 330).

The Commerce Building houses such tenants as F. W. Woolworth Company, Interstate Department Stores and like concerns carrying on a stock distribution and warehouse business (Tr. 301, 302). It houses the Malina Company, Regal Shoe Company, H. A. Caesar and Company and other concerns doing manufacturing and wholesaling (Tr. 302). It houses R. H. Macy and Company, Rand, McNally Company and other tenants doing a distributive and

warehouse business (Annual Report, 1933, p. 62).

An extensive and active campaign was carried on in advertising the building in order to secure tenants (Ex. Q). The Port Authority has held itself out to the public and advertised that it was able to furnish every sort of facility needed by any kind of business enterprise. It has advertised the Commerce Building while "designed primarily for industrial purposes * * * nevertheless has all the advantages of the most up-to-date office building." (Ex. Q, P. A. Commerce Bldg., p. 1.) It is advertised as: "The most complete business structure in the Metropolitan District * * * Designed to provide

every business requirement under one roof. No other building in Manhattan offers such varied and flexible facilities for conducting every phase of a commercial or industrial enterprise" (Ex. Q—"A Complete Business Home," foreword).

It is clear from the advertisements in evidence that the Port Authority by such advertising was soliciting industrial and commercial enterprises of all kinds to become tenants in the Commerce Building

enterprises of all kinds to become tenants in the Commerce Building and therefore was competing with private buildings offering loft, manufacturing, warehouse and office space or any of them

(See also Tr. 330). The Commerce Building is in direct competition with certain buildings known as the 4th Avenue Development on 4th Avenue from 23rd to 34th Streets (Tr. 310-311). It was anticipated and admitted by representatives of the Port Authority prior to erection of the Commerce Building that it would furnish not unreasonable competition to like structures in the neighborhood" (Ex. N, p. 39). Its erection was opposed by the City of New York, by the Chelsea Citizens Association, and by numerous other civic associations interested in the Chelsea neighborhood upon the ground that it would furnish untaxed and therefore unfair competition to private interests (Ex. N, pp. 29, 33, 35, 37, 38, 46, 49).

17. The preponderance of the revenue from the Port Authority Building is produced from the upper floors used for commercial and industrial purposes. The Inland Terminal proper does not produce and never was designed to produce sufficient revenue to support the cost of the land and building on which it is located (Tr. 290).

The upper floors of the building provide in excess of 2,000,000 square feet of space for rent (1930 Report, p. 44) which at 60 cents per square foot, which is the minimum rate charged in the building (Tr. 335), produce an annual rental of over \$1,200,000.00. The maximum rental which could be derived from the Inland Terminal space in the building in 1934 when 65,000 gross tons of freight were han-

dled at 10 cents per ton, would be \$6,500.00 (Tr. 287):

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18. The compact provides that the Port Authority shall not acquire or operate any property within the jurisdiction of any municipality in the Port District without the consent of such municipality (Art. IX). It appears from Exhibit N, the Stenographic Report of the hearing on the location of the Commerce Building, that the City of New York acting through its official governing and financial agency, the Board of Estimate and Appraisal, opposed the location and erection of the building as it now stands (Ex. N, p. 30). There is nothing in the record to show that the consent of the City of New York ever was obtained to its construction. There is nothing in the Compact or in the enabling acts authorizing construction of the Commerce Building and Inland Terminal No. 1 which exempts the Port Authority from municipal taxation upon said property by the City of New York.

It does appear that after the building was erected the Port Authority attempted to make a contract with the City of New York by which the Port Authority should pay an annual sum of approximately \$60,000.00 in lieu of the taxes theretofore paid on the properties which formerly occupied its site (Ch. 553, Acts of N. Y., 1931). This contract was the subject of the suit brought against the Port Authority by the Bush Terminal Company, et als., in the Supreme Court of New York State, in which the power of the Port Authority

to erect the Commerce Building or to make a contract to pay a sum in lieu of taxes thereon was attacked. That suit is now pending upon appeal in the courts of New York State (Tr.

384).

19. In 1932 and long prior to the construction of Inland Terminal No. 1, the Erie Railroad established an inland terminal on Manhattan similar to the one contemplated by the Comprehensive Plan. This was served by motor trucks from terminals in New Jersey over the Erie's ferry system. In its 1923 Report, page 17, the Port Authority stated that "This system is reported to be working with satisfaction to the railroad and to their customers."

During 1927, the Pennsylvania Railroad opened two new inland freight terminals on Manhattan and the Lehigh Valley opened a third such station in the same year (1927 Report, p. 15). In that report the Port Authority states that three railroads were then serving Manhattan by motor truck from New Jersey terminals and that eight inland freight terminals were already in actual operation (1927).

Report, p. 15).

20. Since March 1, 1931, the Port Authority has owned and operated with its own personnel a bus line from Elizabeth, New Jersey, to Port Rimmond, Staten Island, New York, which is used by the general public and upon which a fare is charged. The Port Authority established its own operation in order "to keep the service alive and also with a view to keeping employed surplus employees who would otherwise be released." It was hoped to build up this bus

service to the point where it would "prove attractive to private operators and then eventually return some revenues in the

form of bridge tolls."

21. Taxpayers have placed in evidence a great deal of testimony dealing with the activities of the Port Authority in effectuating the Comprehensive Plan (Testimony of Wilson, Tr. 370 to 538). Taxpayer's brief under the caption "Harbor Development," page 38, devotes an entire section to this point and describes in great detail certain activities of the Port Authority such as the making of studies for the improvement of the harbor, cooperation with municipalities, state and Federal highway commissions, paricipation in rate cases, etc. The annual reports for the years in question show that the Port

Authority expended in effectuation of the Comprehensive Plan only the following sums:

Expenditures for effectuation of comprehensive plan, year ended December 31,

Project Belt Lines—General Belt Line No. 1	Amount
Relt Line No. 1	\$2, 128, 33
Belt Line No. 1	295. 70
Belt Line No. 13—General	4, 998, 07
Food Distribution—Marketing Research Council Food Receiving Terminals and Food Distribution 113 General Development Port Distribution	1, 278. 03
113 General Development Port District Hoboken Marine Terminal	9, 380, 23
Hoboken Marine Terminal I. C. C. and State Commission Cases	73, 102, 04
I. C. C. and State Commission Cases	3, 663. 48
Inland Terminals and Movement of Freight by Motor Trucks Jersey City Marine Terminal	21, 919. 76
Jersey City Marine TerminalSuburban Transit	899: 75
Suburban Transit Terminal Operations—General Traffic Rates and Regulations	20, 372, 84
Terminal Operations—General	33, 235, 83
Traffic Rates and Regulations	7, 011. 76 15, 394. 62
Total	10, 394. 02
Total(1931 Report, p. 89.)	\$207, 188, 88
(1801 Report, p. 89.)	4=01, 100.00
Expenditures for effectuation of	
Expenditures for effectuation of comprehensive plan, year e	nded ·
Project . December 31, 1932	
Belt Lines—General	Amount
	\$1,630.59
	22, 200. 68
	1, 097. 68
	15, 089. 73
	1, 082, 36
Development Work—Port Distriction I. C. C. and State Compileries Compileries	708. 75
	93, 403, 06 13, 287, 56
	10, 201. 00
	8, 657. 62
	5, 500. 00
Suburban Transit	13, 470, 75
Traffic Rates and Regulations	5, 644. 75
Traffic Rates and Regulations	7, 762. 49
	39. 35
Total(1932 Report, p. 86.)	
(1932 Report, p. 86.)	\$189, 575. 35
P	
Expenditures for effectuation of comprehensive plan, year	endod
Project December 31, 1933	nucu
	Amount
Belt Lines—General Belt Line No. 1	\$682.73
Selt Line No. 1Selt Line No. 13—General	1, 962, 02
Belt Line No. 13—General————————————————————————————————————	1, 671. 66
Onsolidated Lightones and Co.	7, 179. 47
Consolidated Lighterage and Carfloatage Operations	998. 45
evelonment Work Book Bland Food Distribution	908, 44
Development Work—Port District C. C. and State Commission Cases Inland Terminal and Movement of Freight by Motor III	74, 652, 85
Inland Towns of Cases	11, 574, 51
and I compared to the state of	24, 206, 27
Inland Terminal and Movement of Freight by Motor Trucks Suburban Transit	
Suburban Transit	1, 393, 32
Suburban Transit	1, 393, 32 4, 819, 56
Suburban Transit Terminal Operations—General Taffic Rates and Regulations	4, 819. 56 8, 561. 47
Suburban Transit	4, 819. 56 8, 561. 47

So far as the record shows no part of the funds expended by the Port Authority as above shown during the years in question was used to pay any part of the compensation of these petitioners.

22. During the years in question the profits from the operation of

the Port facilities were as follows:

¹ Figures in parenthesis indicate page in Annual Report where figures are found.

23. All of the operating revenues and tolls of the Port Authority derived from its various facilities are specifically pledged as security for the payment of its outstanding bonds and obligations, which

pledge constitutes a lien upon such revenues and tolls (Ex. E,

pp. 49, 73, 296; 1931 Report, p. 57). The Port Authority has authority under the compact to mortgage its facilities and any other property now held or to be acquired by it if it so desires (Art. VI).

24. All of the facilities and properties operated by the Port Authority stand in its name and are owned by it (Stip. 40, 48, 54; 1931 Report, p. 57). Neither state has any legal title or claim to any of its properties. Neither state has any lien or claims upon any revenues of the Port Authority (Ex. E, p. 47 and other enabling acts).

There is no provision or saving clause in the compact, Comprehensive Plan, or any of the statutes of either state dealing with the Port Authority which provides for its final liquidation or dissolution or for the reversion of its properties and facilities to either

or both of the two states.

When the bridges, tunnels, and other self-liquidating facilities of the Port Authority now existing are completely amortized in accordance with the provisions of the statutes authorizing them, said facilities having a present value equivalent to the original cost thereof of less depreciation, will constitute unencumbered assets of the Port Authority.

25. The powers and functions of the Port Authority are only such as are given to it by statutes of the two states. It is expressly prohibited from levying any taxes or assessments (Comprehensive Plan, Sec. 8). It cannot borrow money except upon its own credit, nor can

it incur expenses in excess of or in advance of appropriations 117 therefor (Compact, Art. XVII). It has no judicial powers,

no judges or justices, no courts, no sheriffs or baliffs to enforce any laws. All penalties for violation of its rules for its facilities must be enacted by the legislatives of the two states and must be enforced in the regularly established courts of the two states (Compact, Art. XIX). All transportation facilities of the Port Authority are expressly subject to regulation by the Public Service Commission of both states to the same extent "as if such facility were

owned, leased, operated, or constructed by a private corporation"

(Compact, Art. VIII).

26. All of the bridges and tunnels owned and operated by the Port Authority are interstate in character, and hence all charges, rates, rentals, and tolls charged thereon are subject to the power of Congress over such commerce under the Constitution of the United States. The rules and regulations of the Port Authority as to its bridges and tunnels over navigable waters are made expressly subject to the power of Congress over such facilities (Compact, Art. XXII).

27. The operations and activities of the Port Authority during the years in question were predominately in connection with its own facilities. It has never undertaken any projects to develop the harbor proper or the channel of New York in any way. It has never dredged a channel and has no dredges or facilities to do so. It neither owns nor has it constructed or improved any piers, docks, wharves, slips, or pier terminals (Tr. 539, 540). It does not own

or operate any tugs, barges, or marine equipment which could be used for the improvement or conduct of navigation (Tr. 544). It has established no harbor markings, buoys, lights, bells, or any other means for improving navigation (Tr. 543). It has issued no rules or regulations affecting navigation or commerce except in connection with lights on its own bridges (Tr. 541).

28. The facilities constructed and operated by the Port Authority were financed principally by bond issues. Approximately 90% of the funds were provided in that way. The financing afforded by the states was only a very small part, approximately 10%. It was not invested in the enterprise but merely advanced—loaned to it. It must be repaid to the states (Stip., Par. 76). The figures follow:

Arthur Kill Bridges (Stip., Par. 40) George Washington Bridge (Stip., Par. 46) Bayonne Bridge (Stip., Par. 53) Holland Tunnel (1931 Annual Rep. 57); (1932 Annual Rep. 54)	9, 800, 000 4, 100, 000	814, 000, 000 50, 000, 000 12, 000, 000
Commerce Building Inland Terminal (1931 Annual Rep. 57); (1932 Annual Rep. 54)	None	50, 000, 000 16, 000, 000
Add: Midtown Tunnel construction (Stip., Pars. 70, 75)	\$18, 100, 000 400, 000	\$142,000,000 37,500,000
· m	\$18, 500, 000	\$179, 500, 000

Of the advances made settlement of New Jersey's advances of \$4,500,000.00 was made by the issue of \$2,500,000.00 bonds; thereby reducing the advances by states to \$14,000,000.00 and increasing the bond total to \$182,000,000.00.

At the end of 1935, the reserves aggregated in excess of \$1,496,015.00 reflecting an equity equal to 5/7ths of the advances (1933 Annual Report in 72)

Report, p. 73).

The Port Authority has set up on its books reserves for Sinking

Funds, Operating Reserves, and a General Reserve.

On all of the facilities owned and operated by the Port Authority depreciation is charged annually in an amount sufficient to maintain the valuation of said facilities, so that when said facilities are fully depreciated the reserves will be adequate to replace them.

29. In order validly to make the compact and the agreement designated as the "Comprehensive Plan" it was necessary for the states to procure the consent of Congress (U. S. Const., Art. I,

sec. 8, par. 3).

In giving consent to the compact (Ex. E, p. 30), Congress specif-

ically provided:

"That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

In giving consent to the Comprehensive Plan (Ex. E, p. 46), an exactly similar proviso was incorporated, and in addition,

a further one as follows:

"Provided further, that no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War."

The original Comprehensive Plan provided for only one bridge. Specific consent was obtained from Congress for the erection of each bridge and the Holland Tunnel. The consents given for the erection of the bridges appear in Exhibit E, pages 96 to 99, inclusive. Those consents provided that the construction, operation, and maintenance of the bridges had to comply with the "Act to Regulate Construction of Bridges over Navigable Waters," approved March 23, 1906. The consent given by Congress for the construction of the Holland Tunnel appears in Exhibit H, pages 37 and 38, and specifically provides that the consent shall not be considered to affect the right of the United States to regulate interstate commerce or the jurisdiction of the United States over navigable waters.

In all the consents given, there was expressly and unconditionally reserved by Congress the power to alter, amend, or repeal the

· resolutions granting the consents.

Wher'fore, respondent prays that this motion be granted.

(Signed) Herman Oliphant,

Herman Oliphant, General Counsel,

For the Department of The Treasury.

Of Counsel:

George D. Brabson, Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 75816

Docket No. 77375

Docket No. 77376

Docket No. 77377

Docket No. 80769

[Titles omitted.]

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Respondent's motion for reconsideration

Now comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and moves that the Board reconsider its opinion and decision heretofore rendered herein, and that the Board vacate said opinion and decision, or modify the same to conform to the facts of record, and in support of said motion shows:

(1) That under date of November 20, 1936, the respondent filed his motion herein to amend the findings of fact, setting forth wherein the Board's findings of fact were incomplete and inadequate and failed to find numerous facts which were pertinent and germane to the issues herein if not controlling thereof, and requesting the Board to make specific findings of fact as to numerous facts of record.

That upon the basis of said amended and specific findings of fact requested by respondent, the opinion and conclusions of the Board are clearly inconsistent and not in accordance with the facts stipu-

lated by the parties or proved by competent testimony.

(2) That upon the basis of said amended and specific findings of fact requested by respondent the opinion of the Board and the conclusions reached therein are clearly erroneous both in fact and in law, and are inconsistent with the decisions of the Supreme Court of the United States in the cases of Helvering v. Powers (1935), 293 U. S. 214; Flint v. Stone Tracy Company (1908, 220 U. S. 107; Trenton v. New Jersey (1916), 262 U. S. 182; California v. U. S. (1936), 297 U. S. 1.

(3) That the findings of the Board in its opinion to the effect that "the Port Authority is organized for and operating in the sovereign function of protecting, improving, and developing the Port of New York, and all of its activities are directed to and are incident to that end" is a pure assumption without foundation in the facts of record, and based upon a wholly erroneous misconception of what

said functions consist of or in what sovereign power said functions are vested by the Constitution of the United States. The

"sovereign function" of a state in connection with its ports and harbors does not consist in engaging in the building of bridges and tunnels as means of transportation for packaged freight for rail-roads and traffic facilities for commuters, but consists in the "tradi-

tional supervision exercised by governments over seaports." See Brush v. Commissioner, U. S., C. C. A. Second, July 13, 1936, which distinguishes the case of Commissioner v. Ten Eyck, 76 Fed. (2d) 515, expressly upon that ground. Moreover, even the sovereign function of supervision over seaports is committed by the Constitution to the Federal Government and not to the states. See U. S. v.

Chandler Dunbar Company (1912), 229 U. S. 53.

(4) That the statement of the Board in its opinion that "the argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation" is a misapprehension of respondent's argument. Respondent made no such contention at the hearing or on brief. What respondent did contend was that the bridges and tunnels of the Port Authority are built and operated between two states and as such are instrumentalities of interstate commerce, and that they are operating across navigable waters; and, therefore, said instrumentalities are subject to power of Congress over those fields of commerce. Covington Bridge Co. v. Kentucky (1893), 154 U. S. 218; Louisville Bridge Co. v. U. S. (1916), 242 U. S. 417.

That the authority of Congress over those fields of commerce

late, and control the usage of such instrumentalities without judicial review by any Court. That the authority of Congress over those fields of commerce is exclusive and is not shared with any of the states. U. S. v. Chandler Dunbar Company, supra. Hence, the construction and operation of such instrumentalities which could only be undertaken with the consent of Congress cannot be held to be an exercise of the powers of another sovereign, to-wit, the State of New York or New Jersey. Hence, the exercise of those functions by the several states is purely permissive and is not sovereign nor governmental in any sense.

Wherefore, respondent prays that this motion be granted.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Of Counsel:

George D. Brabson, Special Attorney, Bureau of Internal Revenue.

GDB-GA 11-25-36.

Before United States Board of Tax Appeals

Docket No. 75816 Docket No. 77375 Docket No. 77376 Docket No. 77877 Docket No. 80769

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[Titles omitted.]

Petitioner's motion in opposition to amendment of findings of fact, including taxpayer's motion for additional findings of fact

Now come the Petitioners by their attorney, Julius Henry Cohen, General Counsel of The Port of New York Authority, and move in opposition to and for the denial of the motion of the respondent filed November 20, 1936, which requests an amendment and correction of the Findings of Fact hereinbefore promulgated on October 28, 1936. In praying the denial of the respondent's motion, the petitioners show:

1. All of the present requests for findings had heretofore been presented to this Board by the respondent in his brief of March 20, 1936, and have been carefully and extensively reviewed by this Board in the Findings of Fact promulgated October 28, 1936, after review by the entire Board.

In his brief of March 20, 1936, the respondent incorporated thirtysix specific requests for findings of fact (Respondent's Brief, pp. 7 to 38, inclusive). The present document is a repetition in haec verba of twenty-nine of those same requests.

Twenty-six of these former requests reappear in the present motion in identical form, three appear in almost identical 128 form, and seven of the former thirty-six requests have now been omitted.

For the convenience of the Board, the repetition of these para-

graphs is tabularized as follows:

The following numbered requests appear both in the Respondent's Brief of March 20, 1936, and in the present motion, in haec verba:

	Present A	lotion						10	7	
	Reques	t No. 1					Responde of March	nt's 20,	Brie 1936	f
	- 61	** 9					Request			
		68 4					44	44	5	
	64							44	6	
	* 44	- 61					44	66	7	
	84				0		88	66	8	
							44	94	9	
	64.	** 8					98	96	11	0
		" 9)				. 66 -	44	15	
	44	" 10)				68	64	16	
	. 41	" 11					. 44	44	17	
	48	" 12					44	44	18	
	2 4	" 13					44	44	19	
	44	" 14					44	81	20	
	44	" 15					.44			
	84	". 16					44		21	
	68	" 17					- 64		22	
	4 86	" 19					44		23	
	44	" 20					44		24	
	. 88	" 21					**		26	
120	Reanosi	No. 22							27	
	ered ace	" 23				6	44		28	
7	. 41	40					Request 1			
	* **	20					. 44		30	
	44	20		×.			er.	44	32	
	46	41					44		33	
		" 29					48		34	
							48		36	

The following numbered requests are identical except that to each has been added an additional paragraph:

| Present Motion | Respondent's Brief of March 20, 1936 | Request No. 25 | Request No. 25 | Request No. 25 | 31 | 35 |

The requests numbered 1, 2, 3, 10, 12, 13, and 14 in the brief of March 20, 1936 are not advanced by the respondent in the present motion.

Subsequent to the trial of this action, the petitioners also submitted and moved for one hundred eighty-five requested Findings. The Findings of Fact actually made by the Board in its decision of October 28, 1936 are complete and comprehensive. They occupy seventeen pages of the Board's report. The cases were under

consideration for a period of about eight months. The report 130 was reviewed by the entire Board and was promulgated with the concurrence of fourteen Members and the dissent of one, though no opinion nor any disagreement with the specific Findings of Fact of the Board were submitted by the dissenting Member. The Findings of Fact so made by the Board constitute a most complete and exhaustive summary of the origin, nature and functions of The Port of New York Authority that has ever been written. It indicates, contrary to the implications now raised by the Bureau of Internal Revenue, that every word of the voluminous pleadings, stipulations of fact, briefs, testimony and exhibits which were submitted to the Board, was carefully read and was drawn upon by the Board in the task of formulating its Findings and its Opinion. Indeed, the care of the Board in the performance of this task, is evidenced by the fact that there are included in the Findings, facts not mentioned at the hearing nor in the briefs, but found by careful perusal of the volumes of exhibits that were introduced.

In the light of these facts, no further argument in opposition to

the granting of the present motion is necessary.

Were it not for the obvious fact that the present motion is only made for the purpose of incorporating the Bureau's requests in a record on appeal, certain of the respondent's contentions might easily be regarded as insolent. For example, that the Board "omitted and

failed to make findings of numerous * * * and pertinent facts," and that the Board "almost completely ignored the facts contained" in "important and relevant documents," and that the Board ignored and refused to find facts which were "pertinent and germane to the issues herein, if not controlling of said issues," and that the Board "almost wholly ignored said testimony, stipulations and concessions of counsel," and that the Board refused to find as to certain facts which the Bureau contends would have been determinative, and that the Board made numerous findings which were "utterly irrelevant and immaterial to the issues." In a document worthy of record, such observations do not pay proper respect to the tribunal before which they are made.

We assume, however, that the motion is in reality but an effort. to obtain inclusion of the Bureau's former requests to find in the record on appeal, since they were not in proper order as part of the Bureau's brief.

2. The fallacies in the Bureau's requests for findings, were pointed out in our Reply Brief, specifically on pages 4 to 8 thereof, under the heading "The Findings Requested by the Bureau." We need not repeat any of the arguments on the merits, in opposition to the granting of this motion-all of which have heretofore been submitted to, and considered by, this Board.

3. We here make reference to the few new requests in the present motion to amend the Findings of Fact. These are contained in the additional paragraphs added to the present Requests (Nos. 18.

24, and 28).

The error of this additional material is clear.

(a) Request No. 18 is identical with the respondent's former Request No. 25 (the error of which was pointed out in Petitioners' Reply Brief at p. 7), except that there has now been added:

"There is nothing in the Compact or in the enabling acts authorizing construction of the Commerce Building and Inland Terminal No. 1 which exempts the Port Authority from municipal taxation upon said property by the City of New York."

Such a request indicates clearly that the respondent either does not, or will not, even attempt to understand the law upon this question, as stated by the Supreme Court in Bush Terminal Co., et al. v. City of New York, et al., 152 N. Y. 144, and as expressed by the Legislatures of the two States in Chapter 553 of the Laws of New York, 1931 and Chapter 69 of the Laws of New Jersey,

However, we need only point out that the respondent stipulated that Inland Terminal No. 1 was exempt from municipal taxation! Stipulation of Facts, Paragraph 97 agrees that,

"97. By special statutes of the States of New York and New Jersey, it is provided that the Port Authority shall be exempt from state and municipal taxation with respect to all property of the

Port Authority."

(b) Request No. 24 is identical with the respondent's former Request No. 31 (the error of which was pointed out in Petitioners' Reply Brief at p 8), except that there has now been added a paragraph to the effect that when the Port Authority bonds are paid off the facilities will become the unencumbered assets of the Port

This really adds no new proposition to the old Request No. 31, and has been completely answered on page 8 of our Reply Brief. properties are clearly held by the Port Authority only as the agent and trustee of the two States, and, save for the lien of the bondholders, is subject to the uncontrolled disposition of the two sover-

(c) Request No. 28 is identical with respondent's form Request No. 35 (the error of which was pointed out in Petitioners' Reply Brief at p. 8), except that there has now been added a paragraph that,

"The Port Authority has set up on its books reserves for Sinking

Funds, Operating Reserves, and a General Reserve."

This was so stipulated (Stipulation, Paragraph 76 and Exhibit K), and was so found by the Board (Case v. Commissioner, 34 B. T. A. 187 at pp. 12 and 13).

4. We venture the suggestion that the Bureau's disappoint-

ment with the Findings is due to the inescapable logic of the reasoning which arises out of the Board's careful marshalling of the facts—the great governmental purpose underlying the plan of the two states, and the urgent governmental need which prompted The Board's analysis of the facts shows quite clearly that the few points on which the Bureau sought to rest its case-such as revenues from bridge tolls do not accord with a sincere effort to "see the facts clearly and see them whole." The Bureau would, of course, have been better satisfied if the Board's findings had ignored the facts developed by the petitioners. These facts are contained in a separate motion, "Petitioners' Proposed Findings of Fact," duly filed on March 20, 1936, which are attached hereto and made a part of this The Board has, in truth, already acted on the motion now made, because it was only after the most painstaking analysis of both sets of requested findings that the Board arrived at the Findings of Fact contained in its report. A report which gives a true picture of . the Port authority, its history and its functions, should not be modified because of the disappointment of a litigant who merely repeats verbatim a request already made and adequately acted upon by this Board.

Wherefore, the Petitioners pray that the motion of the respondent,

filed November 20, 1936, as aforesaid, be denied.

JULIUS HENRY COHEN, Counsel for Petitioners.

Of Counsel: WILBUR LAROE, Jr. AUSTIN J. TOBIN.

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Docket No. 75816

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Docket No. 77376

Docket No. 77377

[Titles omitted.]

Notes on petitioners' proposed findings of fact

For the convenience of the Member, we have made parenthetical references after each finding to the sources for authorities in support thereof in the Stipulation, Transcript, and in the Port Authority's Trial Brief. Where the Brief is referred to, the reference will be understood to be directed to the facts and authorities therein cited, rather than to the Brief itself as an ultimate authority. Many of the findings are based directly upon facts agreed upon in the Stipulation. Where the language used is not identical with the language of the Stipulation, we have so indicated.

For the convenience of the Member, we also submit the following

topical index of the paragraphs of the Proposed Findings:

The Petitioners' are Employees of the P	P	ars,	
The Petitioners are Employees of the Port Authority	7	1-2	2 .
The Employment of Montgomery B. Case The Employment of E. Morgan Barradale The Employment of Philip L. Cosh-relation	3	to	10
		to	19
The Employment of Billings Wilson	20	to	
		to	34
Organization and Nature of Port Authority	. 35	to	41
The Port Problem	42	to	44
The Origins of the Port Authority The Compact	40	to	61
The Compact The Comprehensive Plan	62	to	71
The Comprehensive Plan	72	to	76
General Powers and Functions	17	to	81
Bridges and Tunnels	107	to	106
George Washington BridgeBayonne Bridge	107	to	119
Bayonne Bridge Holland Tunnel	120	to	126
Holland TunnelMidtown Hudson Tunnel	127	to	132
Midtown Hudson Tunnel	133	to	144
Financing	143	to	152
Inland Terminal No. 1 General Development of Port and Harbor	150	to	155
General Development of Port and Harbor	136	to.	171
	112	to.	185

Before United States Board of Tax Appeals

Docket No. 80769

[Title omitted.]

Petitioners' proposed findings of fact

1. The five petitioners above named are individuals and citizens of the United States. The petitioner Montgomery B. Case is a resident of Englewood, County of Bergen, in the State of New Jersey. The Petitioner Philip L. Gerhardt is a resident of the County of Kings, City and State of New York. The petitioner E. Morgan Barradale is a resident of South Orange, County of Essex, in the State of

New Jersey. The petitioner John J. Mulcahy is a resident of the County of New York, City and State of New York. petitioner Billings Wilson is a resident of the County of

Bronx, City and State of New York (Stip., No. 1).

2. Each of the five petitioners above named is an employee of The Port of New York Authority (Stip., No. 2).

3. Montgomery B. Case was employed by The Port of New York Authority pursuant to a resolution of the Commissioners of the Port Authority dated March 3, 1927, as Engineer of Construction at a salary of \$12,000 per year. Prior to the year 1931 Mr. Case's salary had been increased to \$16,000 per year. Said employment was to take effect and did take effect on April 1, 1927, and continued until Mr. Case left the employ of the Port Authority on December 31, 1932 (Stip., No. 99).

4. Upon entering the employ of the Port Authority Mr. Case took

the following oath:

"I, Montgomery B. Case, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Engineer of Construction of The Port of New York Authority according to the best of my ability" (Stip., No. 100).

5. It was understood that the petitioner was to be at the offices of the Port Authority in New York City on each and every working day from 9 A. M., to 5 P. M. and from 9 A. M. to 12 Noon on Saturday, the normal working hours for all Port Authority employees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties he would, whenever necessary devote such extra time to his duties as might be required without extra compensation (Stip., No. 101).

6. As Engineer of Construction Mr. Case was the executive head of the Construction Division of the Port Authority's Engineering Department and had direct charge of all construction forces working on the George Washington Bridge, Bayonne Bridge, Holland Tunnel and Midtown Hudson Tunnel during the year 1931. His duties were prescribed by the Chief Engineer of the Port Authority to whom Mr. Case was required to and did submit weekly reports, and from time to time he was required to make such further reports as the Chief Engineer required (Stip., No. 102).

7. In all of his duties Mr. Case was under the immediate and direct supervision of the Chief Engineer of the Port Authority and on occasions when Mr. Case differed with the Chief Engineer on matters involving construction or on other matters within the scope of his employment he was directed to proceed in accordance with

the direction of the Chief Engineer (Stip., No. 103).

8. Mr. Case was furnished with an office by the Port Authority in the Engineering Department of the Port Authority's general offices and he was supplied with all necessary supplies and materials by the Port Authority. His office force, engineering assistants, draftsmen, and stenographers were supplied by the Port Authority and were regular employees on the payroll of the Traveling expenses and all other expenses in-Port Authority. curred by him in connection with the performance of his duties were paid by the Port Authority (Stip., No. 104).

9. During the year 1931 Mr. Case had no outside office and no outside business associations or connections of any kind whatsoever. During said year he did no engineering work other than that performed in his capacity of Engineer of Construction for the Port Authority and received no outside income except income or securities held or owned by him during that year (Stip., No. 105).

10. Mr. Case's name appeared on the payroll of the Port Authority and he was required to sign that payroll as were all employees of

the Port Authority (Stip., No. 106).

11. E. Morgan Barradale was a member of the staff of the New York-New Jersey Interstate Bridge and Tunnel Commission from 1919, the date of its organization, down to the time of the merger of that Commission with The Port of New York Authority on

May 8, 1930. He was continued as an employee and a member of the staff of The Port of New York Authority from the 141 date of the merger, with the title of Superintendent of Tunnel Operations, down to the present date. During the year 1933 Mr. Barradale received from the Port Authority in salary the sum of \$10,174.97 (Stip., No. 107).

12. As an employee of the New York-New Jersey Bridge and Tunnel Commission, Mr. Barradale had taken an oath of office (Stip.,

No. 108).

13. It was understood that the petitioner was to be at the administrative offices of the Holland Tunnel in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 Noon on Saturday, the normal working hours for all Port Authority employees except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties he would, whenever necessary, devote such extra time to his duties as might be required without any extra compensation, and, as a matter of fact, because operations in the Holland Tunnel and other Port Authority facilities are twenty-four hour operations, it would be necessary for Mr. Barradale throughout his period of employment to devote a large amount of additional time to his work (Stip., No. 109).

14. As Superintendent of Tunnel Operations Mr. Barradale is in charge of the operation and maintenance of the Holland Tunnel and had direct charge of all Port Authority employees engaged in tunnel operations during the year 1933. His duties were prescribed by the Assistant General Manager in Charge of Operations to whom Mr. Barradale was required to submit daily, weekly, monthly and annual reports, and from time to time he was required to make such further reports as the Assistant General Manager in Charge of Operations required (Stip., No. 110).

15. Furthermore, Mr. Barradale was required to and did submit a monthly time report showing the number of hours worked on each and every day during the month, the number of hours spent in connection with each of the several activities undertaken by him in the course of his employment, and the number of hours worked each day

over and above the seven standard hours (Stip., No. 111).

16. In all of his duties Mr. Barradale was under the immediate and direct supervision of the Assistant General Manager in Charge of Operations and on occasions when Mr. Barradale differed with the Assistant General Manager on matters within the scope of his duties he was directed to proceed in accordance with the direction of the Assistant General Manager (Stip., No. 112).

Mr. Barradale was furnished with an office by the Port Authority in the Administration Building of the Holland Tunnel in

New York City and was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers and other assistants were supplied by the Port Authority and were regular employees on the pay roll of the Port Authority. Traveling expenses and all other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority (Stip., No. 113).

18. Mr. Barradale had no outside business connection during the year 1933 except for his office and position as Director and President of the South Orange Building and Loan Association. During the year 1933, Mr. Barradale received no outside income except fees from said South Orange Building and Loan Association and income derived from rents or interest on securities held or owned by him during

that year (Stip., No. 114).

19. Mr. Barradale's name appeared on the payroll of the Port Authority and he was required to sign that payroll as were all em-

ployees of the Port Authority (Stip., No. 115).

20. Mr. Gerhardt was employed by the Port Authority pursuant to a resolution of the Commissioners of the Port Authority dated May 7, 1931, with the title of Industrial Consultant at a salary of \$8,500 a year. During the year 1933, however, Mr. Gerhardt received a salary of \$8,137.50 as a result of a salary reduction applicable to practically all Port Authority employees during that year. Mr. Gerhardt's employment was effective May 16, 1931, and has continued to

the present date (Stip., No. 116).
21. On entering the Port Authority's employ Mr. Gerhardt

took the following oath:

"I, Philip L. Gerhardt, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Industrial Consultant of The Port of New York Authority according to the best of my ability" (Stip., No. 117).

22. It was understood that Mr. Gerhardt was to be at the office of the Port Authority in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 Noon on Saturday, the normal working hours of all Port Authority employees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned.

hours to his Port Authority duties he would, whenever necessary, devote such extra time to his duties as might be required, with any extra compensation. As a matter of fact, Mr. Gerhardt's duties in connection with the operation of Inland Terminal No. 1 constantly required his presence at the office of the Port Authority at hours other than and in excess of the normal working hours for all Port Authority employees (Stip., No. 118).

23. As Industrial Consultant Mr. Gerhardt's duties as assigned for the year 1933 involved the design of the building from an

operations standpoint and the general supervision of the operation and rental of Inland Terminal No. 1. His duties were prescribed by the General Manager of the Port Authority to whom Mr. Gerhardt was required to submit such reports on matters of operation and rental as the General Manager may, from time to time, require. In all of his duties Mr. Gerhardt was under the immediate and direct supervision of the General Manager of the Port Authority and on occasions when Mr. Gerhardt differed with the General Manager on matters involving operations or rental or on other matters within the scope of his employment, he was directed to proceed in accordance with the direction of the General Manager (Stip., No. 119).

24. Mr. Gerhardt was required to submit monthly time reports itemizing the number of hours worked in each day and describing the work performed, the number of hours spent in connection with each type of work, and the number of hours worked each day over and above the seven standard hours. These time reports were approved over the signature of the Real Estate Agent of the Port Authority, in whose general office Mr. Gerhardt's office is located (Stip., No. 120).

25. Mr. Gerhardt was furnished with an office by the Port Authority in the Port Authority's general offices and he was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and the personnel of his staff engaged

in the management, operation, and rental of Inland Terminal No. 1, were supplied by the Port Authority and were regular employees on the payroll of the Port Authority. Travelling expenses and all other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority (Stip., No. 121).

26. Mr. Gerhardt had no outside office and no outside business association or connection of any kind whatsoever during the year 1933. He received no outside income during the year 1933 except a small amount of bank interest (Stip., No. 122).

27. Mr. Gerhardt's name appeared on the payroll of the Port Authority and he was required to sign that payroll, as were all em-

ployees of the Port Authority (Stip., No. 123).

28. Mr. Wilson has been constantly employed by the Port Authority from July 1, 1922, to the present time. During the year 1933 he had the title of Assistant General Manager and received a salary of \$14,625 for that year (Tr., p. 371).

29. On entering the Port Authority's employ Mr. Wilson took an

oath of office (Tr., p. 371).

30. It was understood that Mr. Wilson was to be at the office of the Port Authority in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 Noon on Saturdays, the normal working hours of all Port Authority employees, except,

of course, on such occasions as his Port Authority duties might require his presence elsewhere. He was required to devote so much extra time to his duties as might be required without any extra compensation. As a matter of fact, Mr. Wilson's duties in connection with the general operations of the Port Authority constantly require him to divide his duties between administrative work in the office and inspection and supervision work in the field, as

the exigencies of operations in his charge demand (Tr., p. 372). 31. As Assistant General Manager in charge of operations, Mr. Wilson's duties as assigned for the year 1933, involved the general supervision of all of the operations of the Port Authority including. the supervision, maintenance, operation, and repair of all bridges and tunnels. In all of his duties, Mr. Wilson was under the immediate and direct supervision of the General Manager of the Port Authority and on occasions when Mr. Wilson differed with the General Manager on matters that involved operation or other matters within the scope of his employment, he was directed to proceed in accordance with the direction of the General Manager (Tr., p. 526).

32. Mr. Wilson was furnished with an office by the Port Authority in the Port Authority's general offices. He was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and personnel of his staff engaged in the various activities under Mr. Wilson's direction, were supplied by the

Port Authority and they were regular employees on the payroll of the Port Authority. Travelling expenses and other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority (Tr., p. 527).

33. Mr. Wilson had no outside office, no outside business connection or association of any kind whatsoever during the year 1933. He received no outside income during the year 1933 except such as was received from securities and investments owned by him (Tr., p. 527).

34. Mr. Wilson's name appeared on the payroll of the Port. Authority and he was required to sign that payroll as were all

employees of the Port Authority (Tr., p. 527).

35. Mr Mulcahy was, during the year at issue (1932) and ever since has been, an employee of the Port of New York Authority. During the year 1932 Mr. Mulcahy was employed as Assistant General Manager of The Port of New York Authority and received salary of \$10,950 for that year (Tr., p. 529).

36. Mr. Mulcahy's employment has continued from June 1, 198. to the present date. On entering the Port Authority's employ, Mr.

Mulcahy took an oath of office (Tr., p. 530).

37. It was understood that Mr. Mulcahy was to be at the office of the Fort Authority, New York City, on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 noon on Saturdays, the normal working hours of all Port Authority em-

ployees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties, he would, whenever necessary, devote such extra time to his duties as might be required without any extra compensation. As a matter of fact Mr. Mulcahy's duties as assigned for the year 1932 constantly required his presence at the offices of the Port Authority at hours other than and in excess of the normal working hours of other Port

Authority employees (Tr., p. 530).

38. As Assistant General Manager in charge of administration Mr. Mulcahy's duties as assigned for the year 1932, involved the supervision of the entire personnel of the Port Authority. the administrative assistant to the General Manager, and as such assistant was engaged in all phases of the work of the Port Authority, in the execution of the compact, the comprehensive plan, and of the various statutes amendatory thereof and supplementary thereto. His duties were prescribed by the General Manager of the Port Authority, to whom Mr. Mulcahy was required to submit such reports on such matters as the General Manager from time to time required. In all of his duties Mr. Mulcahy was under the immediate and direct supervision of the General Manager of the Port Authority, and on occasions when Mr. Mulcahy differed with the General Manager in matters involving administration or other mat-

ters within the scope of his employment, he was directed to proceed in accordance with the direction of the General Man-

ager (Tr. pp. 530, 531).

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39. Mr. Mulcahy was required to submit monthly time reports, itemizing the number of hours worked in each day, and describing the work performed, the number of hours spent in connection with each type of work, and the number of hours worked each day over

and above the standard seven hours (Tr. p. 531).

40. Mr. Mulcahy was furnished with an office by the Port Authority in the Port Authority's general offices. He was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers and personnel of his staff engaged in the various activities under Mr. Mulcahy's direction, were supplied by the Port Authority, and were regular employees on the payroll of the Port Authority. Traveling expenses and other expenses incurred by him in connection with the performance of his duties, were paid by the Port Authority (Tr. p. 531).

41. Mr. Mulcahy had no outside office, no outside business associations or connection of any kind whatsoever during the year 1932. He received no income whatever during the year 1932 except compensation paid him by the Port Authority. Mr. Mulcahy's name appeared on the payroll of the Port Authority and he was required to sign the payroll as were all employees of the Port Authority (Tr. p. 532).

42. That the Port of New York Authority (hereinafter referred to as the Port Authority) was organized pursuant

to a Compact between the States of New York and New Jersey, dated April 30, 1921, pursuant to Chapter 154 of the Laws of New York, 1921, and Chapter 151 of the Laws of New Jersey, 1921, and confirmed by resolution of the Congress of the United States, Public Resolution No. 17—67th Congress (S. J. Res. 88), and that the Port Authority was and is vested with the powers therein granted to it, or implied by the terms and provisions of said Compact, acts and statutes and such other powers as are granted or implied by Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922, adopted a comprehensive plan for the development of the Port of New York district, and such further powers as are granted or implied by such other statutes of the States of New York and New Jersey as pertain to said Port Authority (Based upon Stip., No. 3).

43. That the Compact hereinabove referred to was a treaty between the States of New York and New Jersey amending and supplementing the Treaty of 1834 between the same two States (Based upon

Stip., No. 4).

44. That the Port Authority is a body politic and corporate and is the municipal corporate instrumentality and agency of the two States (Port Authority Trial Brief, Point II).

45. That the fundamental purpose of the two States of New York and New Jersey in adopting the Treaty of 1834 was to facilitate and encourage the development of the natural resources and

advantages of the bay and harbor constituting the Port of New York, for the mutual benefit of the two States and the health, safety, and general welfare of the people thereof (Port Authority

Trial Brief, pp. 8 to 10).

46. That by reason of the fact that the Hudson and North Rivers, the Kill van Kull and the Arthur Kill, as well as other portions of the bay and harbor of New York constitute and form the political boundary between the States of New York and New Jersey, it has been necessary that any action that has been taken for the development of the Port as a whole, be joint governmental action by the two States (Based upon Stip., No. 5).

47. That prior to and in the year 1916, the States of New York and New Jersey, whose northerly and southerly boundary lines lie within the Port of New York, found themselves faced with the gigantic and expensive problem of the Port's future development

(Based upon Stip., No. 6).

48. That prior to 1916 and for almost two centuries, the development of the facilities of the Port had been unplanned and had proceeded in haphazard and uneconomic fashion (Port Authority Trial

Brief, pp. 6, 7, 11, 15, 19, et seq.; also Stip., Exhibits A and B; see also New York Harbor Case, 47 I. C. C. 643).

49. That the following are some of the facts with respect to the

Port of New York:

(a) That about one tenth of the entire population of the 153 United States lives within a radius of twenty-five miles of the Statute of Liberty, and derives its livelihood from industries and activities dependent upon the continued operation and functioning of the facilities of the Port of New York.

. (b) That in this area lie the financial and industrial centers of

the country.

(c) That the Port of New York is the focal point of our national transportation system and that more than half of our foreign commerce centers or clears within this district.

(d) That the Port of New York is one of the finest natural har-

bors in the world.

(e) That the Port of New York is the terminus in the United States of nearly all the important transatlantic lines (See Port Au-

thority Trial Brief, pp. 19 to 23).

50. That subsequent to the adoption of the Treaty of 1834, the growth of American industry and prosperity, the coming of the railroads, the mounting volume of our foreign commerce, all gave rise to new social problems and new economic conflicts in the development of the Port (Port Authority Trial Brief, pp. 5 to 23).

51. That for seventy years prior to the year 1916, the two States had countenanced the slow and uncertain shuttling of freight

back and forth across the harbor waters to and from the railheads from the Jersey shore and had permitted their most valuable waterfront properties to become cluttered with railroad pier stations to the exclusion and loss of steamship traffic. That the harbor's freight handling facilities were inefficient, wasteful, and antiquated (Port Authority Trial Brief, pp. 5 to 23; see also Tr. p. 380).

52. That prior to the year 1916, the two States had failed to pay adequate heed to, or make provision for the motorization of vehicular traffic, which they were still ferrying across the waters of the Port in the same manner as had been done for the previous two hundred years, and that the two States had permitted this motorized traffic no to congest the streets of Manhattan that many of those streets had become almost impassable (Port Authority Trial Brief, pp. 5 to 23; see also Tr. p. 380).

53. That modern and efficient piers, terminals, and arteries of traffic were required in the Port District to carry on the functions of the Port and to sustain the life and health of the inhabitants of the Port

District (Port Authority Trial Brief, pp. 5 to 23).

54. That prior to the year 1916, the freight handling system of the Port had not been fundamentally improved since the railroads had first come to the Jersey shore (Port Authority Trial Brief, pp. 9

55. That in the year 1916, the Port District was in need of vehicular tunnels and bridges of coordinated freight handling facilities and freight terminals, of express highways and modern piers, warehouses, markets, and other similar facilities (Port Au-

thority Triel Brief, pp. 14 to 23).

56. That up to and including the year 1916, the Port District had fallen behind in its highway and terminal development and that in consequence thereof the flow of food, goods, and merchandise through the Port had become more and more irregular and that terminal and traffic freight handling costs had become laden with the consequent burden of congestion and expense (Port Authority Trial Brief, pp. 15, 16, and 22; see also Tr. p. 380).

57. That these inadequate market facilities, lack of economical means of local transportation for foodstuffs, high expenses of delivering finished and raw materials and inadequacy of terminal facilities were causing annual waste of millions of dollars to the people of the Port District (Port Authority Trial Brief, pp. 15, 16, and 22).

58. That the foregoing conditions had increased the cost of living to the citizens of the Port District and was jeopardizing their health and welfare (Port Authority Trial Brief, pp. 15, 16, and 22; see

also Tr. pp. 380, 474).

59. That the Port of New York was and is the distributing center of the nation and that export and import costs for the entire nation are affected by the inadequacy or inadequacy of the terminal

facilities of the Port. That the range of cost in the handling and transportation of the nation's imports and exports through the Port area is frequently a determinant of the success or failure of the nation's foreign trade (Port Authority Trial Brief, p. 17).

60. That prior to 1916 and for the foregoing reasons, the nation's business relations with the rest of the world were being impeded by the burden of the Port of New York's inadequate terminal, highway, and transportation systems (Port Authority Trial Brief, p. 17).

61. That the matters enumerated above constituted a grave and serious crisis affecting the health, welfare, and safety of the peoples of the two States and of the nation, and were among the factors which led to the making of the Compact between the two States and to the creation of the Port Authority as their joint agent and instrumentality in the work of carrying out a comprehensive program of port, harbor, and highway development (Port Authority Trial Brief, pp. 5 to 23).

62. That the first step to correct these evil and dangerous conditions was taken in 1911 when President Wilson, then Governor of New Jersey, appointed a commission to study the problem of the development of the Port of New York in cooperation with a commission representing the State of New York (Based upon Stip,

No. 7).
63. That following the report of that commission to the
Legislature of New Jersey in 1914, there was created a New
Jersey Harbor Commission which was later merged, together

with several others, into the New Jersey Board of Commerce and

Navigation (Stip., Nos.' 8 and 9).

64. That as a result of reports made by that Commission, the then Governor of New Jersey, Honorable James F. Fielder, appointed a Special Committe to discover ways and means for securing a readjustment of the freight rates to the Port District in favor of the New Jersey side of the harbor. That this committee, which was known as the "Committee on Ways and Means to Prosecute the Case of Alleged Railroad Rate and Service Discrimination at the Port of New York," instituted a proceeding before the Interstate Commerce Commission which was officially known as the New York Harbor Case, Docket No. 8994, 47 I. C. C. 643. This case, which sought a revision of railroad freight rates in favor of New Jersey, aroused considerable opposition on the part of the State of New York, the City of New York, and various civic and commercial organizations (Stip., Nos. 10, 11, and 12).

65. The decision of the Interstate Commerce Commission in the New York Harbor Case aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desirability of unifying the port's transportation system, and such efforts as might be desirable upon the part of both States to effectuate the reorganization

State Chamber of Commerce, Governor Edge of New Jersey

(Stip., No. 13). 66. That in 1917 and upon the invitation of the New York

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and Governor Whitman of New York were brought into conference on the problems of Port development. That subsequently, in the year 1917, the Legislatures of the two States authorized their respective Governors to appoint members of the New York-New Jersey Port and Harbor Development Commission and appropriated \$450,000 for the work of the Commission (Stip., Nos. 14 and 15). Et. That the said Commission was duly appointed by the Governors of the two States and directed, pursuant to the Act providing for its appointment, to make a comprehensive survey of port and arbor conditions, and if any conditions therein appeared to be in need of remedy or change, to recommend proper and adequate remedies and changes therefor. That said Commission undertook and thoroughly carried out said survey and made progress reports of conditions from time to time; including the recommendations, in 1918, of an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two States and proposed a tentative draft of such a Compact for consideration by the Governors and Legislatures of both States. That the Preliminary Joint Report of the New York-New Jersey Port and Harbor Development Commission, containing said recommendations, and which was transmitted to the Legislatures of both States on February 18, 1918 (Exhibit A, attached to the stipulation) is a true and accurate survey of port

159 and harbor conditions as of that time (Based on Stip., No. 16).

68. That thereafter and in 1919, said Joint Commission, having completed its survey, presented to and filed with the Legislatures of the two States and with the Governors thereof, their "Joint Report with Comprehensive Plan and Recommendations". (Exhibit B, attached to the stipulation). That said Joint Report constitutes a true and accurate finding of the port situation and problem as of the year 1920 (Based on Stip., No. 19).

69. That the adoption of the Compact between the States of New York and New Jersey and the enactment of the Comprehensive Plan was preceded by the report of a qualified legislative fact finding commission, to wit: the New York-New Jersey Port and Harbor Development Commission, which report (being the same report referred to in the preceding paragraph) fully and accurately set forth to the Legislatures the facts which necessitated the signing of the Compact and the enactment of the Comprehensive Plan (Based on Stip., No. 20).

70. That on March 29, 1920, Governor Alfred E. Smith sent a special message to the Legislature of the State of New York urging upon the Legislature the adoption of the Compact and that another special message urging its adoption was subsequently sent to the Legislature of the State of New York by Governor Miller during the year 1921, being the said messages set forth in Exhibits C and D,

attached to the stipulation (Based on Stip., No. 21).

York and New Jersey passed Acts authorizing certain designated persons, as Commissioners on the part of said States, to execute an agreement or compact between said States of New York and New Jersey in the form set forth in the said acts. The Act of the State of New York, being Chapter 154, Laws of New York, 1921, became a law April 2, 1921 with the approval of the Governor and the Act of the State of New Jersey, being Chapter 151 of the Laws of New Jersey, 1921, became a law April 7, 1921 with the approval of the Governor of that State. That subsequently and in the month of August 1921, the Congress of the United States consented to said Compact by Public Resolution No. 17—67th Congress; S. J. Res. 88 (August 23, 1921) (Stip., No. 22).

72. That on April 30, 1921, the aforesaid Compact between the States of New York and New Jersey, establishing the Port District and creating The Port of New York Authority, was formally signed by the Commissioners duly authorized so to do by the respective Legislatures in the Great Hall of the Chamber of Commerce of the

State of New York (Stip., No. 23).

73. That by Chapter 152 of the Laws of New Jersey, 1921, J. Spencer Smith, Frank R. Ford, and DeWitt Van Buskirk were selected and appointed as Commissioners to "The Port of New York Authority." That by Chapter 203 of the Laws of New York, 1921, the Governor of the State of New York was authorized by and with

to the aforesaid Port Authority, and that Nathan L. Miller, the then Governor of the State of New York, did, pursuant to such legislation, and with the consent of the Senate, appoint Eugenius H. Outerbridge, Alfred E. Smith, and Lewis H. Pounds as Commissioners thereof. That having taken the oath of office the aforesaid Commissioners met for organization on April 25, 1921, all of the Commissioners being present, and organized The Port of New York Authority by electing officers and appointing members of the staff

(Stip., No. 24).

74. That the signing of the said Compact of April 30, 1921, between the States of New York and New Jersey, consented to and ratified by the Congress of the United States, and the adoption of the Comprehensive Plan for the development of the Port of New York, were determined by the Legislatures and Governors of both States to be, and were, acts necessary to the solution of the governmental, economic, and sociological problems that confronted the States of New York and New Jersey in properly developing the Port of New York District in the interests of the health, welfare, and safety of the peoples of the two States and of the nation (see Compact Recitals and also Joint Report, Exhibit B, p. 1. See also Port Authority Trial Brief, pp. 14 to 29).

75. That the port problem at the Port of New York is unique and extraordinary in character and has required the adoption by the sovereign governments of the State of New Jersey and

the State of New York of extraordinary measures to meet the needs of the peoples of the two States and of the nation in its proper and adequate development and that extraordinary measures upon the part of the two States with respect to the development of the Port are required to fulfill their governmental obligations to safeguard the welfare, health, and safety of their inhabitants (see Joint Report, Exhibit B, p. 1; Port Authority Trial Brief, p. 15).

76. That the said Compact of 1921 created a district to be known as the "Port of New York District" having specified geographical boundaries set forth in said Compact, and gave to The Port of New York Authority certain powers and jurisdiction therein in said

Compact more particularly set forth (Stip., No. 25).

77. That pursuant to the terms and provisions of the Compact, the aforesaid Port Authority investigated conditions within the port district and made findings and recommendations with respect thereto. That pursuant to Chapter 203 of the Laws of New York, 1921, and Chapter 152 of the Laws of New Jersey, 1921, the Port Authority on or about the 21st day of December 1921, presented to the Governor of the State of New York and to the Governor of the State of New Jersey its report and recommendations together with a plan for the comprehensive development of the Port of New York, said "Report with Plan for the Comprehensive Development of the Port of New York" being Exhibit F, attached to the

stipulation. That the conclusions reached in said Report were derived from an intensive study and review of the work of the New York-New Jersey Port and Harbor Development Commission during the years 1917 to 1920, inclusive (Based on Stip.,

No. 26).

78. That pursuant to Article X of the aforesaid Compact of April 30, 1921, and in accordance with the findings and recommendations of the New York-New Jersey Port and Harbor Development Commission embodied in its Joint Report with Recommendations hereinbefore referred to, and of The Port of New York Authority embodied in its Report with Plan for the Comprehensive Development of the Port of New York, dated December 21, 1921, the two States of New York and New Jersey adopted by joint legislation a Comprehensive Plan for the development of the Port of New York District and mutually agreed to carry out said plan and entrusted the effectuation thereof to The Port of New York Authority. That said comprehensive plan is embodied in Chapter 43 of the Laws of New York, 1922. and Chapter 9 of the Laws of New Jersey, 1922, approved by the Congress of the United States (Public Resolution No. 66-67th Congress-H. J. Res. 337), and is the same plan appearing on pages 33 to 44 inclusive of the Port Authority Statute Book, Exhibit E, attached to the stipulation (Stip., No. 27).

79. That it is the carrying out of this Compact and Comprehensive Plan which constitutes the work and function of the Port Authority (see Stip., Nos. 28 and 29, and Port Authority Trial Brief, pp. 34 to

48 inclusive).

80. That under the provisions of the Comprehensive Plan, the Port Authority was authorized and directed to proceed with the development of the Port of New York in accordance with that Comprehensive Plan is rapidly "as may be economically practicable" and was vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State to effectuate the same, except the powers to levy taxes or assessments. The two States have declared that they regard the Port Authority as their municipal corporate instrumentality for the purpose of developing the Port and effecting the pledge of the States in the Compact (see Comprehensive Plan, Section 8; Stip., No. 28).

81. That in a joint resolution (Public Resolution No. 66—67th Congress), the consent of Congress was given to the carrying out and effectuation of the Comprehensive Plan and the Port Authority was authorized and empowered to carry out and effectuate the same (Stip.

No. 29).

82. That the functions of the Port Authority are carried on by twelve Commissioners, six resident voters, each from the States of New York and New Jersey, who are chosen by the respective Governors with the advice and consent of their State Senates. The Commissioners from the State of New York may be removed only upon charges and after a hearing by the Governor. The Commissioners from the State of New Jersey may be removed only upon charges

and after a hearing by the Senate of the State of New Jersey (Stip., No. 94a).

83. That no action of the Commissioners of the Port Au-165 thority is binding unless approved by a majority of the Commissioners from each State. The Governor of each State has a veto power over the acts of each Commissioner from his State and no action of any Commissioner has force or effect until a specified period after the minutes of each meeting have been transmitted to the Gov-

ernor of his State (Stip., No. 94b).

84. That under the provisions of Chapter 222, Laws of New York, 1928, employees who transfer to Port Authority service from State service and who are already members of the State Retirement System, may continue in that System after such transfer to Port Authority service. Under the provisions of Chapter 259, Laws of New York, 1935, all other employees of the Port Authority are permitted to join the New York State Retirement System (Stip., No. 94c).

85. That the Commissioners of the Port Authority are required to

and do subscribe to oaths of office (Based on Stip., No. 94d).

86. Reports on all activities of the Port Authority are required to be and are submitted to the Legislatures and Governors of both States annually and at other times when requested (Stip., No. 94e).

87. Until revenues from the operations of the Port Authority are adequate to meet all expenditures, the legislatures of the two states

are obligated to appropriate, in equal amounts, annually, for the salaries, office, and other administrative expenses, sums .

as recommended by the Port Authority and approved by the Governors of the two states up to \$100,000 in any one year. The Port Authority is prohibited from incurring any such obligation for salaries, office, and other administrative expenses prior to the making of appropriations adequate to meet same by the two legis-

latures (Stip., No. 94h).

88. That under the laws of New York and New Jersey the Port Authority is given power to make vehicular rules and regulations, with respect to the bridges, tunnels, and transportation facilities of the Port Authority, its police force being designated as peace officers. of both states; to enforce, through actions in the State Courts, such regulations, as well as regulations adopted directly by legislation of the States. The violations themselves are incorporated as an integral part of the Criminal Laws of the States of New York and New Jersey; penalties are prescribed therefor; and the inferior criminal courts of the States are given jurisdiction to enforce penalties (Stip., No. 95b).

89. That under the Comprehensive Plan and other statutes of the two states, the Port Authority is given power and authority to fix tolls and charges for the use of all facilities (Stip., No. 95c).

90. That under the laws of the two states bonds and certain obligations of the Port Authority are by legislative enactment made legal for investment by fiduciaries in both states (Stip., No. 95d).

91. That in order to protect public funds deposited by the Port Authority, the statutes of both States give such funds a preference, by providing that all banks and other financial institutions are authorized to give to the Port Authority undertakings, with such sureties as the Port Authority shall approve to secure the deposited funds of the Port Authority, or in lieu of such sureties to deposit with the Port Authority as collateral, such securities as the Port Authority may approve (Stip., No. 95e).

92. That the Port Authority is authorized to make suitable rules and regulations for the improvement of the conduct of navigation and commerce in the Port of New York, which must be approved by the legislatures of both States, and the States are obligated to provide penalties for violations of such rules or regulations or of any order issued by the Port Authority within its jurisdiction (Stip.,

No. 95f).

93. That the Port Authority has the power to hold investigations in connection with matters pertaining to the planning and developing of the Port of New York, and for such purposes jurisdiction "of any and all persons" residing in, or owing property within, the State, and power to issue subpoenas in connection with such jurisdiction. For failure to comply with such Port Authority subpoenas, the Supreme Court may, upon application of the Port Authority, commit such person to jail, or otherwise punish for contempt (Stip., No. 95g).

168 94. That orders of the Port Authority with respect to the regulation or control of port affairs within its jurisdiction are enforceable by mandamus or injunction, or any other relief appropriate to the case. Actions and proceedings involving the Port Authority are entitled to a pref'ence "over all civil cases" (Stip.,

No. 95h).

95. That under the Compact, Comprehensive Plan, and Statutes thereafter adopted by the two States, the Port Authority has the power to construct public highways within the Port District, in connection with the execution of the Comprehensive Plan (Stip., No.

95i).

96. That the Compact directs the Port Authority to make plans, from time to time, for the development of the Port District, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, the Compact provides that they shall be binding upon both States with the same force and effect as if incorporated in the Com-

pact itself (Stip., No. 95m).

97. That the Port Authority may from time to time make recommendations to the legislatures of the two States or to the Congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the Port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce (Stip., No. 95n).

98. That the Port Authority may petition any interstate commerce commission (or like body), public service commission, public utility commission (or like body) or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the Port Authority may be designed to improve or better the handling of commerce in and through said District, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the Port (Stip., No. 95c).

99. That the States of New York and New Jersey have reserved the right to add to, modify, or change any part of the Comprehensive Plan, with the concurrence of the other (Stip., No. 95p).

100. That the Port Authority is authorized and directed by the two States to proceed with the development of the Port of New York in accordance with the Comprehensive Plan as rapidly as may be economically practicable, and is vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State, to effectuate the same, except the power to levy taxes and assessments (Stip., No. 95q).

101. That in the execution of the Comprehensive Plan the Port Authority has the power of eminent domain (Based upon Stip.,

No. 96).

170 102. That by special statutes of the States of New York and New Jersey, it is provided that the Port Authority shall be exempt from state and municipal taxation with respect to all property of the Port Authority. The statutes of the two states enacting the Comprehensive Plan, provides that "The bonds or other securities issued by the Port Authority shall at all times be free from taxation by either state" (Stip., No. 97).

103. That the Port Authority has no stock and no stockholders; that the Port Authority, although in corporate form is wholly owned and controlled by the two sovereign states, of New York and New Jersey, and not by any private persons or corporations (Based upon Stip., No. 98a; see also Compact and Comprehensive Plan and Point.

II of Port Authority's reply brief).

104. That all projects of the Port Authority are operated in the interest of the public and no profits inure to the benefit of private

persons (Stip., No. 98b).

105. That the States of New York and New Jersey obligated themselves to the payment of the administrative expenses of the Port Authority, each in the amount of One hundred thousand (\$100,000) Pollars, per year, until the revenues of the Port Authority were adequate to meet its expenditures (Stip., No. 98d).

106. That the various projects of the Port Authority are, and have been declared by the two states to be in all respects for the bene-

171 fit of the people of the two states, for the increase of their commerce and prosperity and for the improvement of their health and living conditions, and that the Port Authority is and has been declared by the two states to be performing a governmental function in undertaking the construction, maintenance and operation of its bridges and tunnels and Inland Terminal No. 1 and in effectuating the Comprehensive Plan. That under the laws of both States it is required to pay no taxes or assessments upon any of the property acquired by it for the construction, operation, and maintenance of

such projects (Based upon Stip., No. 98f).

107. That on August 7, 1923, the Governors of the State of New York and of the State of New Jersey delivered to the Port Authority a joint statement outlining their views as to construction of additional vehicular tunnels or bridges between the States of New York and New Jersey, and requested the Port Authority to investigate the matter and make a report to said Governors with suggested legislation, if any were necessary, in time to be submitted to the respective legislatures early in their sessions of 1924. The Governors said that they favored the construction at the earliest possible moment of additional vehicular tunnels or bridges between the State of New York and the State of New Jersey which were to be determined upon, constructed and financed by the Port Authority (Stip., No. 30; see also Tr., p. 473, et seq.).

108. Following the receipt of the aforesaid communication 172 from the Governors of the two states, the Port Authority proceeded to make preliminary studies of traffic conditions, present building costs, and other material questions relating to transportation between the New York and New Jersey shores of the Hudson River, the Arthur Kill and the Kill van Kull insofar as they might bear upon the question of the construction of tunnels or bridges

and the most desirable locations therefor (Stip., No. 31).

109. That on December 5, 1923, after due notice had been given in the public press and by direct communication to the municipalities, trade bodies and transportation interests within the Port District, a public hearing on the subject of additional vehicular tunnels or bridges between the State of New York and the State of New Jersey was held, which meeting was attended by eighty persons representing forty-eight separate organizations, of which forty presented written or oral statements relating to the subject (Stip, No. 32).

110. That on December 21, 1923, the Commissioners of the Port Authority rendered to the Governor of the State of New York and to the Governor of the State of New Jersey, a "Report on Vehicular Tunnels and Bridges" which set forth the studies and hearings upon the subject of additional vehicular tunnels or bridges between the States of New York and New Jersey, and recommended, among other things, that preliminary engineering and traffic studies of plans for a bridge north of 125th Street, between the Borough of Manhattan and the State of New Jersey, and for at least two

173 additional vehicular tunnels between New York and New Jersey

should be promptly undertaken (Stip., No. 33).

111. That on January 19, 1924, The Port of New York Authority submitted to the Governor of the State of New York and to the Governor of the State of New Jersey its Report for the calendar year 1923 which contained at pages 21 to 24 inclusive thereof, a summary of further findings and studies with respect to the necessity of constructing additional vehicular crossings between the States of New York and New Jersey (Stip. No. 34).

112. That by joint legislation embodied in Chapter 125 of the Laws of New Jersey, 1924, and Chapter 230 of the Laws of New York, 1924, the States of New York and New Jersey authorized The Port of New York Authority in partial effectuation of the comprehensive plan for the development of the Port of New York, to construct, operate, maintain and own a bridge with the necessary approaches thereto across the Arthur Kill between Perth Amboy on the New Jersey side

and Tottenville on the New York side (Stip. No. 35).

113. That by joint legislation embodied in Chapter 149 of the Laws of New Jersey, 1924, and Chapter 186 of the Laws of New York, 1924, the States of New York and New Jersey authorized The Port of New York Authority, in partial effectuation of the comprehensive plan for the development of the Port of New York to construct,

operate, maintain and own a bridge with the necessary approaches thereto across the Arthur Kill between Elizabeth on the New Jersey side and Howland Hook on the New York side (Stip. No. 36).

114. That during the calendar year 1924 the Port Authority, with the aid of appropriations by the two states aggregating \$200,000 appropriated therefor, made borings, surveys and engineering studies as to the character and location of said bridges, thoroughly canvassed local sentiment, attended meetings of local interests and meetings with committees appointed by the Mayors of the three municipalities concerned, made counts of the vehicular traffic crossing all the ferries on the Arthur Kill and Kill van Kull, investigated the records of the ferry companies and made other studies with reference to the necessary and desirability of constructing the aforesaid bridges across the Arthur Kill.

That in its annual report for the calendar year 1924 to the Governor of the State of New York and the Governor of the State of New Jersey, dated January 24, 1925, the Port Authority presented to the two states a resumé of its work in connection with said bridges, set forth on pages 42 to 43 inclusive of said report (Stip. No. 37).

115. That during the calendar year 1925, the Port Authority continued its studies with respect to the two bridges across the Arthur Kill, and obtained the approval of the War Department of the Federal Communication.

eral Government to construction of said bridges (Stip. No. 38).

116. That during the year 1926, the Port Authority in accordance with the directions of the two State Legislatures, as aforesaid, commenced construction of the two bridges across the

Arthur Kill; one between Perth Amboy in the State of New Jersey and Tottenville in the State of New York, which bridge was named the Outerbridge Crossing, and the other between Elizabeth in the State of New Jersey and that section of Staten Island in the State of New York known as Howland Hook, which bridge was named the Goethals Bridge. That such construction work was pursued until the said bridges were opened for traffic on June 29, 1928, having been completed at a cost in excess of \$17,000,000. That this cost was financed by the advance to the Port Authority of \$4,000,000 by the two states, and through the sale of bonds of the Port Authority, which bonds are known as "New York-New Jersey Interstate Bridge Bonds—Series A," in the amount of \$14,000,000 (Stip., No. 39).

117. That the Port Authority has since continued to own, maintain, and operate, and is at present maintaining and operating and does own the aforesaid bridges over the Arthur Kill, in partial effectuation of the Comprehensive Plan. That in its operation of these bridges the Port Authority may and has charged tolls to defray the maintenance, operation, and general expenses of these bridges, interest charges, and to repay the aforesaid "New York-New Jersey

Interstate Bridge Bonds—Series A," the advances made by the two states, debt service on General and Refunding Bonds

(which, however, under existing statutes cannot be issued for any new facilities except two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its general reserve fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 on these two bridges was in excess of \$400,000, being paid by traffic in excess of 800,000 vehicles (Stip., No. 40).

118. That for the years 1928, 1930, and 1931 the operation of these bridges resulted in annual surpluses, as follows:

1928	\$272, 676, 75
1930	76, 683, 54
1931	40, 673, 37

That for the years 1929, 1932, 1933, and 1934 the operation of these bridges resulted in annual net deficits, as follows:

1929	\$23, 340, 21
1932	
	187, 272. 17
1933	295, 534, 46
1934	908 851 90

The surplus noted for the year 1928 resulted from the fact that interest on the funded debt of the two bridges for that year was charged to the investment account, for the reason that, although the two bridges had been opened to traffic on June 29, 1928, as aforesaid,

the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1928 (Stip., No. 41).

119. That in the operation of these bridges and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are

designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter 113, Laws of

New Jersey, 1932 (Stip., No. 42).

120. That by joint legislation embodied in Chapter 41 of the Laws of New Jersey, 1925, and Chapter 211 of the Laws of New York, 1925, the States of New York and New Jersey authorized and empowered The Port of New York Authority, in partial effectuation of the Comprehensive Plan for the development of the Port of New York, to construct, operate, maintain, and own a bridge with the necessary approaches thereto across the Hudson River from points between 170th Street and 185th Street, Borough of Manhattan, and points approximately opposite thereto in the Borough of Fort Lee, Bergen County, New Jersey, and appropriated the sum of \$200,000—\$100,000 by each State—for the making of preliminary studies with reference to said bridge (Stip., No. 43).

121. That during the calendar year 1925, the Port Authority undertook studies for the bridge across the Hudson River from Fort Lee

to Manhattan of the same character undertaken with respect 178 to the Arthur Kill Bridges, and that said studies are reported upon in the annual report of The Port of New York Authority to the Governors of the States of New York and New Jersey for the calendar year 1925, dated January 15, 1926, at pages 13 to

19 inclusive thereof (Stip., No. 44).

122. That during the calendar year 1926, the Port Authority continued its studies with reference to the character and location of the Hudson River Bridge between Washington Heights in the Borough of Manhattan, City of New York and the Borough of Fort Lee, New Jersey. That such studies were fully reported upon by the Port Authority to the Governor and Legislature of the State of New York and to the Governor and Legislature of the State of New Jersey in the annual report of The Port of New York Authority for the calendar year 1926, dated January 20, 1927, at pages 47 to 69 inclusive thereof (Stip., No. 45).

123. That during the year 1927, the Port Authority, in accordance with the directions of the two State Legislatures, as aforesaid, commenced construction of the said bridge over the Hudson River between Fort Lee in the State of New Jersey and the Borough of Manhattan in the City and State of New York, which bridge is known as the George Washington Bridge. That such work was pursued until the said bridge was opened for traffic on October 25, 1931, having been completed at a cost in excess of \$57,000,000. That

this cost was financed by the advance to the Port Authority of \$9,800,000 by the two states, and through the sale of bonds of the Port Authority, which bonds are known as "New York—New Jersey Interstate Bridge Bonds, Series B", in the amount of \$50,000,000 (Stip., No. 46).

124. That the Port Authority has since continued to own, maintain and operate, and is at present maintaining and operating and does own the aforesaid George Washington Bridge over the Hudson River,

in partial effectuation of the Comprehensive Plan. That in its operation of this bridge the Port Authority may charge and is charging tolls to defray the maintenance, operation, and general expenses of this bridge, interest charges, and to repay the bonds sold for its construction, the advances by the two States, debt service on General and Refunding bonds (which, however, under existing statutes cannot be issued for any new facilities except two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its General Reserve Fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 was in excess of \$3,300,000, being paid by traffic in excess of 6,150,000 vehicles (Stip. No. 48).

125. That for the years 1931 to 1934, inclusive, the operation of the George Washington Bridge resulted in a net income from

operations, prior to deductions for amortization, as follows:

1931	\$504, 264, 08
1932	1, 473, 363, 61
1933	1, 142, 770, 42
1934	1, 356, 476, 67
(Stip. No. 49.)	. 1, 000, 110. 01

126. That in the operation of this bridge and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter 113,

Laws of New Jersey, 1932 (Stip. No. 50).

127. That by joint legislation embodied in Chapter 97 of the Laws of New Jersey, 1925, and Chapter 279 of the Laws of New York, 1926, The Port of New York Authority was authorized and empowered, in partial effectuation of the Comprehensive Plan for the development of the Port of New York, to construct, operate, maintain, and own a bridge with the necessary approaches thereto across the Kill van Kull from Bayonne on the New Jersey side to

Staten Island on the New York side (Stip. No. 51).

128. That during the calendar year 1926, the Port Authority continued its studies with reference to the character and location of such a bridge across the Kill van Kull between Bayonne in the State of New Jersey and Port Richmond, Staten Island, in the State of New York. That such studies were fully reported upon by the Port Authority to the Governor and Legislature of the State of New York in the annual report of The Port of New York Authority for the calendar year 1926, dated January 20, 1927, at page 67 thereof (Stip. No. 52).

129. That during the year 1928, the Port Authority, in accordance with the authorization of the two State Legisla-

tures, as aforesaid, commenced construction of the said bridge over the Kill van Kull between the City of Bayonne on the New Jersey side and Port Richmond, Staten Island, on the New York side, which bridge was named the Bayonne Bridge. That such work was pursued until the Bayonne Bridge was opened for traffic on Novem-

ber 15, 1931, having been completed at a cost in excess of \$13,000,000. That this bridge was financed by the advance to the Port Authority of \$4,100,000 by the two states, and through the sale of bonds of the Port Authority, which bonds are known as "New York-New-Jersey Interstate Bridge Bonds, Series C," in the amount of

\$12,000,000 (Stip. No. 53).

130. That the Port Authority has since continued to own, maintain, and operate, and is at present maintaining and operating and does own the aforesaid Bayonne Bridge over the Kill van Kull, in partial effectuation of the Comprehensive Plan. That in its operation of this bridge the Port Authority may charge and is charging tolls to defray the maintenance, operation, and general expenses of this bridge, interest charges and to repay the bonds sold for its construction, the advances by the two States, debt service on General and Refunding Bonds (which, however, under existing statutes cannot be issued for any new facilities except two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its General Reserve Fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 was in excess of \$210,000, being paid by traffic in excess of 450,000 vehicles (Stip. No. 54).

. 131. That for the year 1931, the operation of the Bayonne

Bridge resulted in annual surplus of \$25,400.29.

That for the years 1932 to 1934, inclusive, the operation of the Bayonne Bridge resulted in annual net deficits, as follows:

240, 890, 18 163, 848, 67

The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason that although the bridge was opened for traffic on November 15, 1931, as aforesaid, the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1931 (Stip. No. 55).

. 132. That in the operation of this bridge and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter 113, Laws of New Jersey,

1932 (Stip. No. 56).

182

133. That prior to, and independently of their consideration of a Comprehensive Plan for the development of the Port of New York, the States of New York and New Jersey had for many years,

back at least as far as 1906, examined and investigated the necessity for, and practicability of, construction of one or more vehicular bridges or tunnels across the North or Hudson River between the Borough of Manhattan, City of New York, and the neighboring metropolitan areas on the westerly side of the River in the State of New Jersey (Stip. No. 57).

134. That by Chapter 260 of the Laws of New York, 1906, there was created "The New York Interstate Bridge Commission," consisting of three members appointed by the Governor, for the purpose of conferring, on behalf of the Governor and Legislature of the State of New York, with the Governor and Legislature of the State of New Jersey, for the purpose of considering the feasibility and practicability of constructing one or more bridges over the Hudson River from the City of New York to the State of New Jersey at

the joint expense of both States (Stip. 58).

135. That by Chapter 319 of the Laws of New York, 1907, the number of Commissioners of the New York Interstate Bridge Commission was increased to five, one of the additional members to be appointed by the Mayor of the City of New York and the other to be the incumbent of the office of Commissioner of Bridges of the said City. From time to time thereafter additional legislation was enacted continuing the Commission, making appropriations for its needs and extending its powers. By Chapter 189 of the Laws of New York, 1913, the Commission was authorized to consider the possibilities

of vehicular tunnel construction and its name changed to "The New York State Bridge and Tunnel Commission" (Stip. No. 59).

136. That throughout its existence the New York State Bridge and Tunnel Commission conferred and cooperated with New Jersey Commissions and other agencies, both official and unofficial in character, and rendered reports to the Governor and Legislature of the State

(Stip. No. 60).

137. That by Chapters 49 and 50 of the Laws of New Jersey, 1918, the Governor and Legislature of that State created The New Jersey Interstate Bridge and Tunnel Commission and authorized the construction of a bridge or tunnel or tunnels across the Hudson and Delaware Rivers at the direct expense (so far as New Jersey's share

of the cost was involved) of the State (Stip., No. 62).

138. That the New Jersey State Legislature of 1919, by Chapter 70 of the Laws of New Jersey, 1919, provided funds in the amount of one million dollars for the construction of a tunnel or tunnels under the Hudson River and five hundred thousand dollars for construction of a bridge across the Delaware River and ten thousand dollars for expenses incidental to the work and enabled The New Jersey Interstate Bridge and Tunnel Commission to take up with renewed vigor the final preliminary work prior to construction of the interstate bridges and tunnels which the Legislature directed the Comstate of the State of

mission to construct. That the Legislature of the State of New York took similar action immediately in the same year and provided as its share of funds for the construction of a tunnel or tunnels by appropriating for the use of The New York Interstate Bridge and Tunnel Commission the sum of one million dollars (Stip., No. 63).

139. That on or about the 30th day of December 1919, pursuant to the authorization of the Legislatures and Governors of both States,

the State of New York, acting by and through The New York Interstate Bridge and Tunnel Commission, and the State of New Jersey, acting by and through The New Jersey Interstate Bridge and Tunnel Commission, entered into an agreement for construction of an interstate vehicular tunnel under the Hudson River between the City of New York and the City of Jersey City, under which said tunnel was to be constructed and operated jointly by the Commissioners as direct agents and representatives of the two States. That prior to the signing of said agreement the Congress of the United States consented thereto by Public Resolution No. 10—66th Congress (S. 409) (Stip., No. 64).

140. That in the year 1920 The New Jersey Interstate Bridge and Tunnel Commission and The New York Interstate Bridge and Tunnel Commission submitted to the Legislatures of their respective states a complete report of their studies and activities during the year 1919 as to the nature and location of the proposed vehicular

tunnel (Stip. No. 65).

186 141. That said tunnel was constructed by said Commission and is now known as the Holland Tunnel. That the share of the cost of the construction of said tunnel to be borne by the State of New York was met by direct appropriations of the State. That New Jersey's share of the cost of construction of said tunnel was defrayed by the proceeds of a bond issue covering the cost of construction, both of said tunnel and of the Delaware River Bridge, which bond issue was authorized by the Governor and the Legislature of the State of New Jersey following its approval by a referendum vote of the people of that State (Stip., No. 66).

142. That following the construction of said Holland Tunnel and its operation over a period of years by the aforesaid New York Interstate Bridge and Tunnel Commission and the aforesaid New Jersey Interstate Bridge and Tunnel Commission, acting as a joint Commission on behalf of both States, it was determined by the States of New York and New Jersey, acting through the Governors and Legislature thereof, that the operation of said tunnel facility should be conducted and continued as part of the operations of The Port of New York Authority in carrying out the Comprehensive Plan for the development of the Port of New York. Accordingly, by Chapter 247 of the Laws of New Jersey, 1930, and by Chapter 421 of the Laws of New York, 1930, the New York—New Jersey Interstate Bridge and Tunnel Commission was merged with The Port

of New York Authority, and the Port Authority was vested by the two States of New York and New Jersey with the control, operation, and maintenance of the Holland Tunnel (Stip., No. 67).

143. That by the joint legislation of the two states, embodied in Chapter 4 of the Laws of New Jersey, 1931, and Chapter 47 of the Laws of New York, 1931, the two States declared a bi-state policy in regard to certain vehicular bridges and tunnels within the Port of New York District, and in furtherance of said policy, vested the

control and operation of the Holland Tunnel in The Port of New York Authority, and authorized the Port Authority to construct an additional interstate vehicular tunnel. That in declaring said policy the States agreed that the vehicular traffic moving across the interstate waters within the port of New York district, created by the Compact, constitutes a general movement of traffic which follows the most accessible and practicable routes, and that the users of each bridge or tunnel benefit by the existence of every other bridge or tunnel since all such bridges and tunnels as a group facilitate the movement of such traffic and relieve congestion at each of the several. bridges and tunnels. Accordingly the two states, in the interest of the users of such bridges and tunnels and the general public, agreed that the construction, maintenance, operation, and control of all such bridges and tunnels theretofore or thereafter authorized by the states should be unified under the Port Authority, to the end that tolls and other revenues therefrom should be applied so far as practicable

to the costs of the construction, maintenance, and operation of said bridges and tunnels as a group and economies in operation effected. The states declared that it was their policy that such bridges and tunnels should as a group be in all respects self-sustain-

ing (Stip., No. 68).

144. That in the legislation referred to in the preceding paragraph the States of New York and New Jersey in furtherance of the aforesaid policy, and in partial effectuation of the comprehensive plan theretofore adopted by the two states for the development of the port of New York district, vested in the Port Authority the control, operation, tolls and other revenues of the Holland Tunnel and authorized and empowered the Port Authority to construct, own, maintain, and operate the Midtown Hudson Tunnel together with such approaches thereto and connections and highways as the Port Authority should deem necessary or desirable. That though the two states vested the control and operation of the Holland Tunnel in the Port Authority as aforesaid, the two states each retained title to the said Holland Tunnel in their own names (Based on Stip., No. 69).

145. That the two states by the legislation referred to in the preceding paragraphs also directed that the Port Authority should, from time to time, make studies, surveys, and investigations to determine the necessity and practicability of additional vehicular bridges and tunnels in the port district, and report to the governors and legisla-

tures of the two states thereon (Based on Stip., No. 69).

146. That prior to 1931, the States of New York and New Jersey had, by joint legislation embodied in Chapter 420, Laws of New York, 1930, and Chapter 248, Laws of New Jersey, 1930, authorized and empowered the Port Authority to study and report upon such a vehicular tunnel under the Hudson River between a point in the vicinity of 38th Street in the Borough of Manhattan, City and State of New York, and a point opposite thereto in the State of New Jersey. That the two states, in the same legislation, had appropriated the sum of \$400,000, \$200,000

being appropriated by each state, for defraying the expenses of

such preliminary studies (Stip. No. 70).

147. That during the calendar year 1930, the Port Authority undertook studies covering all phases of the preliminary investigation of such a tunnel under the Hudson River between West 38th Street in Manhattan and the Township of Weehawken, in New Jersey, and submitted a report on the results of these investigations to the Governors and Legislatures of the two states. The principal conclusions of these reports may be found in the annual report of The Port of New York Authority to the Governors of the States of New York and New Jersey covering the calendar year 1930 and dated February 20, 1931, at pages 40 and 41 thereof (Stip., No. 71).

148. That by the aforementioned and quoted legislation, embodied in Chapter 4 of the Laws of New Jersey, 1931, and Chapter 47

of the Laws of New York, 1931, the two States authorized and empowered the Port Authority, in partial effectuation of

the Comprehensive Plan for the development of the Port of New York, to construct, own, maintain, and operate the Midtown Hudson Tunnel under the Hudson River, together with the necessary

approaches thereto (Stip., No. 72).

149. That during the calendar years 1931, 1932, and 1933, the Port Authority continued its studies, plans, and preparations with reference to the Midtown Hudson Tunnel. That such studies and conclusions were fully reported upon by the Port Authority to the Governors of the two states in the annual reports of The Port of New York Authority for the calendar years 1931, 1932, and 1933 (Annual Report for the year 1931, dated February 18, 1932, at pages 39 and 40; Annual Report for the year 1932, dated March 1, 1933, at pages 37 to 39 inclusive; Annual Report for the year 1933, dated March 5, 1934, at pages 42 to 44, inclusive) (Stip., No. 73).

150. That during the year 1934, the Port Authority, in accordance with the aforesaid directions of the two states, commenced construction of the Midtown Hudson Tunnel. That the Port Authority is now engaged in the construction of said tunnel and that it is planned that the work of construction will be completed and that the tunnel

will be opened for traffic during the year 1938 (Stip., No. 74).

151. That the estimated cost of the first operating unit of the Midtown Hudson Turnel, which consists of the Mid-

town Hudson Tunnel, which consists of the southerly tube, is in excess of \$37,500,000 and that this cost was being financed by a loan to the Port Authority by the United States of America, as is more fully recited hereinafter in this stipulation (Stip., No. 75).

152. That the Port Authority goes forward with the construction, maintenance, and operation of all of its facilities on a self-liquidating basis. That it is the policy of the Port Authority to operate all of these facilities at the lowest possible tolls or charges consistent with the protection of its bondholders, as required by the statutes. That the Port Authority does not attempt to make a profit; but merely aims to pay its maintenance, operation, interest, and amortization

charges. That in the handling of requests for the reduction of tolls, which are received from time to time, the Port Authority makes studies, analyses its traffic, its revenues, its operating expenses, and its debt charges, for the purpose of seeing whether it is possible to make any reductions and still continue on a self-liquidating basis. That at the present time the revenues of the Port Authority are just sufficient to meet its maintenance and operation costs, its interest, and its amortization charges (Tr., p. 525).

153. The projects of the Port Authority have been financed in part by outright apropriations of the States of New York and New Jersey; in part by direct advances of the States of New York and New Jersey, as against which the revenues of the projects are to be paid over to the states at the times and in the amounts specified in the statutes applicable thereto; and in part by bond issues of The Port

of New York Authority.

As of November 30, 1935 (adjusted to give effect to the sale on December 11, 1935, of \$16,500,000 General and Refunding Bonds, and to give effect to the cancellation on December 30, 1935, of \$14,800,000 of Midtown Hudson Tunnel Notes) the Port Authority's funded debt was as follows:

New York-New Jersey Interstate Bridge Bonds, Series A (Arthur Kill Bridge Construction). Outstanding—\$12,200,000; of which the

Port Authority has acquired and pledged \$5,643,000;

New York-New Jersey Interstate Bridge Bonds, Series B 4's, B 41'2's (George Washington Bridge Construction). Outstanding—\$48,420,000; acquired by the Port Authority and pledged \$1,580,000;

New York-New Jersey Interstate Bridge Bonds, Series C (Bayonne Bridge Construction). Outstanding—\$8,861,000; acquired by the

Port Authority and pledged \$3,139,000;

New York-New Jersey Terminal Bonds, Series D (Inland Terminal Construction). Outstanding—\$14,820,000; acquired by the Port Authority and pledged \$1,180,000;

New York-New Jersey Interstate Tunnel Bonds, Series E (Holland Tunnel). Outstanding—\$46,008,000; acquired by the Port Authority

and pledged \$992,000;

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General and Refunding Bonds, First Series 4%, Due 1975 (Refunding and Midtown Hudson Tunnel Construction). Outstanding—\$45,331,000;

General and Refunding Bonds, Second Series, 3%%, due 1965 (Midtown Hudson Tunnel Construction). Outstanding (as of De-

cember 11, 1935), \$16,500,000;

Series F Bonds (George Washington Bridge). Outstanding—\$2,500,000.

Prior to 1931, the Port Authority had issued its A, B, and C Bonds for bridge construction. Each issue is secured by a first lien upon revenues of the particular project, but in each case the lien is suspended as to current revenues when an amount equal to 20% of the issue is accumulated in sinking or special reserve funds, over and above current interest and maturities. The two States have

advanced moneys in aid of the bridges as follows: Arthur Kill Bridges: Construction-\$4,000,000, Preliminary Studies-\$200,000; Bayonne Bridge: Construction-\$4,000,000, Preliminary Studies-\$100,000; George Washington Bridge: Construction-\$9,500,000, Preliminary Studies-\$300,000; except for New Jersey's advance (\$4,500,000) in aid of the George Washington Bridge which was recently liquidated by the issue of Series F Bonds, the Bridge Financing Acts (see Port Authority Statute Book, Exhibit E, pp. 100, 130, 147, 168, 177, 187) require the repayment of the foregoing advances out of bridge revenues, in the amounts and at dates specified in the statutes, but this requirement is subject to the prior liens of the bridge bonds.

In 1931 the two states agreed that bridges and tunnels crossing interstate waters in the Port District, should be unified under the Port Authority (Chapter 47, Laws of New York, 1931; Chapter 4, Laws of New Jersey, 1931), and further agreed that surplus revenues

from various Port Authority projects should be pooled in a General Reserve Fund to support various Port Authority securities (Chapter 48, Laws of New York, 1931; Chapter 5, Laws of New Jersey, 1931). At the same time, the States vested the Port Authority with the control and operation of the Holland Tunnel.

The bonds of the Port Authority have been issued or contracted to be issued to the general public, as exempt from Federal and State taxation, based upon the opinion of Counsel that they were so exempt. Respondent denies that the bonds of the Port Authority are exempt from Federal taxation.

The same year, the Port Authority issued its Series D and E Bonds (secured respectively by the revenues of the Holland Tunnel and Port Authority Inland Terminal No. 1), and pledged its General Reserve Fund as security for all of its outstanding issues, including

the prior bridge issues.

In 1933, the Port Authority entered into an agreement with the United States (acting through the Federal Emergency Administration of Public Works) for the financing of the first operating unit of the Midtown Hudson Tunnel. Pursuant to this agreement, \$2,500,000 of Midtown Hudson Tunnel Notes were issued to refund prior bank loans for tunnel purposes, and the Government purchased installments of Midtown Hudson Tunnel Notes aggregating \$12,300,000.

In 1935 the Port Authority adopted a program for the refunding of its then outstanding obligations aggregating \$152,000,000 (Series

A to E, inclusive, and Midtown Hudson Tunnel Notes) 195 through the medium of its General and Refunding Bonds, which are supported by a pledge of its General Reserve Fund and (subject to prior liens and to the repayment of State advances) by a pledge of revenues of projects now in operation or under construction. In addition, all bonds acquired pursuant to the refunding program with the proceeds of General and Refunding Bonds are

pledged as collateral security for General and Refunding Bonds. Each issue of bonds so pledged is to be fully retired and cancelled when the entire issue has been acquired, except that no bridge issue is to be fully retired and cancelled until the advances made by the State for the particular project have been liquidated or amortized.

Pursuant to its refunding program, the Port Authority has refunded the bonds shown above as acquired for retirement. It has also refunded and fully retired and cancelled the entire issue of Midtown Hudson Tunnel Notes. Negotiations are now being carried on with the Federal Emergency Administration of Public Works looking to the cancellation of the existing Loan Agreement, and the making of an outright grant in aid of the construction of the Midtown Hudson Tunnel not to exceed \$4,780,000 (Stip., No. 76).

154. That the distribution of Port Authority revenues as of November 1, 1935, is accurately shown upon Exhibit K attached to the Stipulation. Any excess revenues of the Port Authority are expendable for such purposes as may be directed by the two States (Based

on Stip., No. 76 at p. 29).

155. That the agreement between the United States of America and the Port Authority (Exhibit L attached to the Stipula-

tion) for the financing of the first operating unit of the Midtown Hudson Tunnel contains a provision that the Government should be furnished with opinions of the Port Authority's General Counsel and of the Government's own Bond Counsel to the effect that the Midtown Hudson Tunnel Notes were "exempt, under the Constitution of the United States as now in force, from any and all taxation (except estate, inheritance and gift taxes), now or hereafter imposed by the United States of America or by the States of New York or New Jersey," and that the Government should be under no obligation to purchase any of the Notes unless it was satisfied on that point, Such opinions were furnished and the aforesaid Midtown Hudson Tunnel notes were accepted by the Government partly on the basis thereof (Based on Stip., No. 76 at p. 29).

156. That the Port Authority has conducted extensive studies into the system of transportation, highway and terminal facilities of the Port District and into methods of handling freight by the various railways, ferry companies and other transportation agencies, and over the highway systems of both States entering said District, and into methods of remedying street, highway, and waterway congestion in connection with the existing and contemplated transportation, highway and terminal facilities, and in accordance with such studies, the Port Authority has sought means of improving such systems and

methods of freight handling and transportation facilities. The foregoing studies have been conducted in accordance with the provisions of the Compact of April 30, 1921, and of the Comprehensive Plan (Stip., No. 79; see also Tr., pp. 380 to 384).

157. That the Commissioners of the Port Authority, in their annual reports, fully apprised the Legislatures and Governors of both

the States of New York and New Jersey of the steps being taken, to remedy such conditions by means of an integrated and coordinated system of Union Inland Freight Terminals at strategic points in the Port District and that the Governors and Legislatures of both states have assisted The Port of New York Authority in its studies in connection with this problem by state appropriations and by legislation which has empowered the Port Authority to construct such terminals on a self-liquidating basis as integral parts of the Comprehensive Plan (Based on Stip., No. 80).

158. The location and character of "Inland Terminal No. 1" was determined by the Port Authority after exhaustive research and studies and after a public hearing for the purpose of "adducing what facts, data, information, and opinions will be of aid in determining location, system, and character" of such a terminal building (Stip.,

No. 81; see also Tr.; pp. 380 to 389).

159. That such public hearing was attended by representatives of nunicipalities, railroads, shippers, consignees, warehouse men, civic

and trade associations, property owners, and others, and that the opinions of all persons interested in the location and character of such a terminal were canvassed and secured by the Port Authority prior to its determination as to the location and char-

acter of Inland Terminal No. 1 (Stip., No. 82).

160. That the Commissioners of the Port Authority, in their annual reports, fully apprised the Legislatures and Governors of both the States of New York and New Jersey of the character and location of the Inland Terminal No. 1 prior to the construction thereof by the Port Authority (Stip., No. 83).

161. That the resolutions of the Port Authority authorizing and approving the construction of Inland Terminal No. 1, including the utilization of the upper floors thereof for office, loft, and manufacturing purposes, were approved and ratified by the Governors of the

States of New York and New Jersey (Stip., No. 84).

162. That the acts of the Port Authority in constructing the Inland Terminal No. 1, as it exists today, were approved and ratified by the Governors and Legislatures of the States of New York and New

Jersey (Stip., No. 85).

163. That on or about the 31st day of December, 1930, the Port Authority entered into a written agreement with eight trunkline railroads entering the Port of New York District whereby the Port authority agreed to erect an Inland Terminal Building and to lease substantially all of the Street and basement floors of said building to said trunkline railroads for a term of five (5) years with the privilege and option on the part of the railroads to renew said lease for nine successive periods of five (5) years each, for use as an Inland Terminal Station for the transportation, assemblage, and the distribution of less-than-carload freight for each railroad. That the upper floors of said building are constructed in such a manfacturing, offices, and other industrial and business uses, and that the entire building is 15 stories in height, covers one city block and is 800

feet in length and 200 feet in width (Based on Stip., No. 86).

164. That pursuant to said agreement of December 31, 1930, substantially all of the street and basement floors of said Inland Terminal Building are now actually leased to and in use by the aforesaid trunkline railroads as an Inland Terminal Station for the transportation, assemblage, and the distribution of less-than-carload freight and that such Inland Terminal Station is commonly known as Inland Terminal No. 1 (Stip., No. 87).

165. That said Inland Terminal Station is not subdivided among

the carriers but is a union station (Stip., No. 88).

166. That the construction of Inland Terminal No. 1 has eliminated a large amount of duplication of trucking and traffic congestion and was intended to, and did bring about, a large saving of time and expense to the merchants and consumers of the Port

District and is contributing to the progressive development of the Port under the provisions of the Comprehensive Plan (See Port Authority Trial Brief, pp. 43 to 48; see also Transcript,

pp. 390 to 396, 400 to 405, 408 to 410, and 418 to 421).

167. That the construction, operation, and maintenance of the upper stories of said Inland Terminal Building was and is vitally and essentially connected with and is a necessary and inseparable part of the construction, operation, and maintenance of the Inland Terminal Station on the ground and basement floors of said building and that the Port Authority in the construction of the entire building acted solely in the public interest and in accordance with the mandate and purposes of the Compact and the Comprehensive Plan (see reference appended to request No. 166).

168. That the addition of said upper floors are merely incidental to the Inland Terminal Station and that without those floors it would have been economically impossible to construct the Inland Terminal Station pursuant to the Compact and the Comprehensive Plan. That the dominant object of the Inland Terminal Building, including the construction of said upper floors was its use for terminal purposes (see reference appended to request No. 166, and particularly Tr.,

pp. 400 to 405).

169. That it would have been a financial impossibility to establish an Inland Terminal Station in the Borough of Manhattan on a self-supporting and self-liquidating basis without

hattan on a self-supporting and self-liquidating basis without
the addition of upper stories to be utilized for revenue producing purposes, and that without the prospect of obtaining revenue through utilization of air-rights by the renting of such upper
stories, the Port Authority would have been unable to borrow the
funds needed to finance the erection of the Inland Terminal Station;
and consequently would have been unable to carry out and effectuate
the mandate of the aforesaid Compact and Comprehensive Plan (see

reference appended to request No. 166, and particularly Tr., pp. 402 to 405).

170. That the Inland Terminal Building is not and cannot properly be separated into two distinct parts—the terminal operation on the one hand, the upper stories on the other—it is a self-sustaining unit and its revenue producing features are availed of only for the purpose of making possible the performance by the Port Authority of its functions under the Comprehensive Plan (see reference appended to request No. 166).

171. That the number of floors in the Inland Terminal Building was determined on the basis of the amount of revenue that would be required to construct, operate, and maintain Inland Terminal No. 1 on a self-supporting and self-liquidating basis (see Tr., pp.

402 and 403).

172. That prior to the formulation and adoption of the Comprehensive Plan, there were ferry companies operating between New

York and New Jersey, and that the facilities constructed by the Port Authority, pursuant to the statutory plan are in competition with those ferries, and have reduced their traffic and their earnings. That the ferry companies so affected were either independent and privately owned companies, or operated by or in connection with railroad companies serving the Port of New York District, and that in either event, those ferry companies were subject to taxation, both federal and state, as private corporations (Stip. Tr., pp. 368 and 369).

173. That during the taxable years in question the Port Authority was engaged in studies, which were embodied in reports and recommendations to the United States Army Engineers and to the Rivers and Harbors Committee of Congress, relative to the necessary channel improvements, establishment of anchorage areas, fixing of pier and bulkhead lines and determination of clearances for overhead bridges and subaqueous tunnels and pipe lines. That these activities were exercised pursuant to and in partial effectuation of

the Compact and the Comprehensive Plan (Tr., p. 423).

174. That pursuant to the powers vested in the Port Authority by the compact to make suitable rules and regulations for the improvement of the conduct of navigation and commerce (Stip., No. Sta), the Port Authority has been active in such harbor matters. That in 1933, pursuant to its power to hold investigations in connection with the planning and developing of the Port of New York (Stip., No. 95g), the Port Authority held public hearings on the subject of free storage time allowed to freight on steamship piers. Pursuant to this, legislation was introduced in both States to give the Port Authority power to regulate such practices. This legislation has already been passed in New York (Chapter 711, Laws of New York, 1935) and is pending in New Jersey (Tr., pp. 495, 507-510).

175. That at the request of the Cities of New York, Elizabeth, and Newark, and pursuant to the direction in the Comprehensive Plan concerning assistance and advice to municipal officials on port problems, the Port Authority has prepared reports on the feasibility of

establishing foreign trade zones in these municipalities (Tr., pp.

497-9).

176. That pursuant to the provision in the Comprehensive Plan that the Port Authority cooperate with State Highway Commissioners, so that trunk line highways will fit in with the Comprehensive Plan, numerous studies have been made and assistance rendered in this field. Prior to the financing and construction of each of its interstate bridges and tunnels, the Port Authority made elaborate studies of the origin and destination, as well as the volume of traffic flow as a guide to determining the need for connecting highways. This information is brought up to date periodically and made available to the United States Bureau of Public Roads and the State Highway Departments of New York and New Jersey, and other public officials whose duties involve the planning of arterial highways and the allot-

ment of funds for their construction. In the engineering and 204 financial aspects of linking up the interstate bridge and tunnel plazas and connecting highways, the Port Authority dovetails its plans with those of the State highway officials and assumes a substantial share of the expense (see Port Authority Trial Brief, p. 39;

Tr., pp. 432-6, 440-7, 451, 482-93, and 501-2).

177. That studies and planning have been carried out by the Port Authority in cooperation with federal, state, and municipal officials in connection with the food supply and terminal markets of the Port District. Investigations of terminal market requirements and the cost of handling and marketing foods in the Port District have been conducted in cooperation with the United States Department of Agriculture and other governmental agencies. At the request of a committee of the New Jersey Legislature, expert assistance was given on projects for terminal market improvements for Northern New Jersey. Assistance was rendered to the City of New York in its plans for relief of terminal market congestion. Detailed recommendations were made to the railroads and to the Federal Coordinator of Transportation in respect to coordination of railroad produce terminals (see Port Authority Trial Brief, p. 39).

178. That pursuant to the direction of the Compact (Article XIII) and in partial effectuation of the Comprehensive Plan, the Port Authority takes a leading part in contesting discriminatory inland or

ocean rates and eliminating other barriers to the free flow of commerce, in order to protect the Port of New York against the diversion of traffic due to inequitable freight rates (see

Port Authority Trial Brief, p. 40; Tr., p. 429).

179. That the Port Authority, in partial effectuation of the Comprehensive Plan and in accordance with its supervisory powers over the Port of New York, gathers data and conducts negotiations with the Customs officials, both in Washington and abroad, in respect to the clarification of requirements for transit of goods in bond and the adjustment of trade barriers through reciprocal trade agreements. That the Port Authority, in Washington in 1929 and in London in 1933, was called upon to take the lead in straightening out the con-

fusion concerning the interpretation of Customs regulations with regard to the movement of millions of bushels of Canadian grain in transit through the United States (see Port Authority Trial Brief,

o. 40).

180. That pursuant to the direction of the Comprehensive Plan that terminal operations in the Port District should be unified, the Port Authority proceeded to study and recommend to the railroads progressive unification and improvement of their existing facilities wherever practicable. That in one instance, a thirteen mile stretch of tracks along the New Jersey waterfront between Bayonne and Edgewater was unified after detailed studies by the Port Authority and extensive negotiations with the proprietary carriers, and hear-

ings before the Interstate Commerce Commission, with the result that direct hauls of thirteen miles replaced circuitous hauls of over a hundred miles. That these unifications have

rought about great savings to shippers (Tr., pp. 274-9).

181. That other unifications in the Port of New York District have been studied in great detail by the Port Authority, and that pursuant to these studies, and recommendations to the railroads and to the Federal Coordinator of Transportation, substantial progress has been made, particularly in the unification of railroad pier stations. That pursuant to such activities and establishment by the Port Authority of Inland Terminal No. 1, and other factors, seven railroad piers in New York City have been discontinued. This result not only reduces the overhead cost of freight transportation, but also aids in the freeing of waterfront property for steamship operations (Tr., pp. 381, 418, 421).

182. That as a result of studies of the marine operations of the railpads in New York Harbor over a period of years, the Port Auhority recommended the pooling of marine equipment for the eliminaion of waste. As a result of these recommendations the carriers instituted a unified Railroad Marine Service, which succeeded in curalling waste effort and reducing the expense of these operations

1r., p. 426),

183. That frequently all harbor operations in the Port of New York are seriously interfered with by fog and ice conditions, which have been so serious during the past winters that on occasions traffic

has been brought practically to a standstill. That such delays and stoppages due to ice, fogs, and other weather conditions are a constant menace to the health, life, and safety of the inhabitants of the Port District who are thereby cut off, by the water barriers of the Port, from the sources of their vital foodstuffs, drugs, fuel, and other necessities of life. That the work of the two States and of the Port Authority in providing the first vehicular interstate crossings between New Jersey and Manhattan has been directed in large measure to the relief of these dangerous conditions and has substantially diminated those perils (Tr., pp. 473-476; Port Authority Trial Brief, p. 21).

184. That the Port Authority has made a thorough survey of the movement of dangerous cargoes of explosives, gasoline, and combined chemicals, on boats throughout the harbor. That pursuant to the recommendations of the Port Authority the Interstate Commerce Commission, and the Bureau of Steamboat Inspection, have drafted suitable regulations for the better control of this type of traffic, in order to reduce such hazards; and members of the Port Authority have assisted in the framing of those regulations (Tr., p. 497).

185. That the work of the Port Authority in the elimination of waste and congestion has effected great savings to the shippers and consuming public of the Port District and has substantially lowered the cost of living and increased the material prosperity in the said

District (Tr., pp. 408-410, 427-430, 480-1, and 493-4).

Before United States Board of Tax Appeals 208

Docket No. 75816

Docket No. 77375

Docket No. 77376

Docket No. 77377

Docket No. 80769

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[Titles omitted.]

Petitioners' motion in opposition to motion for a reconsideration.

Now come the petitioners by their attorney, Julius Henry Cohen, General Counsel of The Port of New York Authority, and move in opposition to, and for the denial of the motion of the respondent, filed November 27, 1936, which requests that the Board reconsider its opinion and decision heretofore rendered herein, and vacate said opinion and decision. In praying the denial of the respondent's motion the petitioners show:

1. The paragraph numbered (1) of respondent's motion makes it clear that the entire motion for a reconsideration is conditioned upon the granting of the motion made by the respondent under date of November 20, 1936, requesting the Board to make new

Findings of Fact.

In the petitioners' papers submitted in opposition to that motion,

we have set forth our reasons for its complete denial.

Since this motion for reconsideration is submitted by the respondent "upon the basis of said amendment and specific Findings of Fact requested by respondent," we might rest our opposition entirely upon the reasons set forth in opposition to the respondent's motion to amend the Findings. Very clearly if that motion is 210 denied, as we believe it must be, the present motion for reconsideration cannot be entertained.

2. Moreover, no new arguments whatsoever are suggested to the Board in the present motion for a reconsideration. In view of the time that was taken in the presentation of this case, the exhaustive stipulation of facts, exhibits, oral testimony, arguments, briefs, and reply briefs with which this Board has been burdened, it would seem inevitable that no new arguments could be presented. Indeed, it was the position of the representatives of the Bureau of Internal Revenue, during the trial, that the issues raised by the Bureau had not, therefore, been thoroughly presented to the Board, but that now all of the "new" arguments were completely presented and before the Board.

We will content ourselves therefore, simply with references to the briefs and other documents heretofore submitted and to the opinion of the Board, wherein may be found all of the contentions upon which this motion for a reconsideration is advanced.

3. In the paragraph numbered (3) of its motion, the respondent

states that the conclusion of this Board that:

"The Port Authority is organized for and operating in the sovereign function of protecting, improving, and developing the Port of New York, and all of its activities are directed to and are incident to that end"

is a "pure assumption."

After all that has been submitted to this Board, and the opportunities that have been given to the representatives of the respondent to present everything they could present, such a statement is incomprehensible. Is it necessary to begin all over again—in order to make clear to the Bureau of Internal Revenue what is very clear to this Board, to the Legislatures of the two States, and to every court, Federal and State, which has considered it during the past fifteen years? We refer briefly only to the Stipulation of Facts, paragraph 95 (q), which reads:

"The Port Authority is authorized and directed by the two States to proceed with the development of the Port of New York in accordance with the Comprehensive Plan as rapidly as may be economically practicable, and is vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State to effectuate the same, except the power to levy taxes and assessments."

See also Stipulation, paragraphs 3, 5, 6, 25, 26, 27, 28, 29, 95 (a), 95 (f), 95 (g), 95 (h), 95 (m), 95 (n), and 95 (o). See also petitions of the second statement of the se

tioners' Trial Brief, pages 5 to 48.

We confess that we do not understand the attempted distinction of Commissioner v. Ten Eyck, 76 F. (2d) 515, put forward in the same paragraph of the respondent's motion for reconsideration. If the Bureau means that the Circuit Court held the Albany Port District

212 Commission to be immune because it carried on "traditional supervision exercised by governments over seaports" and that that traditional supervision was limited to passive observance and the remote supervision of the development of the seaport Albany—then we can only say that no one who had read the Ten Eyck case could make such a contention.

The contention at the conclusion of the paragraph numbered (3) of the respondent's motion for reconsideration to the effect that the supervision of seaports is exclusively committed to the Federal Government and not to the States, was completely answered by us in petitioners' Trial Brief, pages 107, et seq., and pages 128 to 132 in-

clusive. See also petitioners' Reply Brief, page 12.

In the paragraph of the respondent's motion for reconsideration numbered (4), the Bureau of Internal Revenue expresses the view that the Board misapprehended its principal contentions. We submit, however, that the Bureau's attempted distinction between the Board's statement of its argument, and that same argument as now restated by the Bureau, shows that one is identically the same as the other, and shows clearly also that the Board understood the argument well enough but declined to accept it as sound. The present contention of the Bureau merely indicates that the clear reasoning of the Board, supporting our contentions, is not yet convincing to the Bureau.

As a matter of fact, on the argument of the case, the representative of the Bureau advanced the argument in almost the same language used by the Board in its opinion. The language of the

Board is that:

213 "the argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation."

The Bureau says that it never made that argument, yet at page 639 of the record, Mr. Uriel said:

** * these instrumentalities are instrumentalities of interstate commerce, and are, therefore, not exempt from Federal Income Tax,"

and on page 658 of the record, he said that:

"* * where an agency of a state * * goes into the field of interstate commerce * * *,"

it loses its governmental immunity from taxation.

At all events, the opinion of the Board on this point completely

answers the contention advanced by the Government.

It should be noted that on pages 10 and 11 of the petitioners' Reply Brief this argument of the Government is phrased in almost the precise language of their "corrected contention."

Wherefore, the petitioners pray that the motion of the respondent filed November 27, 1936, be denied.

Julius Henry Cohen, Counsel for Petitioner.

Of Counsel:

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WILBUR LA ROE, JR., AUSTIN J. TOBIN.

Before United States Board of Tax Appeals

Docket No. 75816

Docket No. 77375

Docket No. 77376

Docket No. 77377

Docket No. 80769

[Titles omitted.]

Order denying motion to amend findings

Consideration has been given to respondent's motion filed November 20, 1936, and petitioners' opposition, filed December 22, 1936. The motion is long and, although it has been considered in detail, specific reference to its many items is unnecessary. In substance all the material facts requested (as distinguished from legal inferences and quotations from public statutes) have been found and are set forth in the report as succinctly as consistent with a full basis for a proper decision of the issue. The motion is in error in stating that any of the evidence has been ignored. In so far as the motion sets forth variances between the form in which findings were requested and the form in which the findings have been made, it has been considered in a zealous effort to see whether any substantial fact has been omitted. No such omission appears, and it is not to be expected, therefore, that the form should be modified. Many of the facts referred to in the motion, if not all, are not in dispute and appear only in the stipulation, and it may be doubted whether the Board should be required to restate them in any particular form of compendium. This is dearly so in respect of the provisions of the Compact, which is public law, referred to throughout the motion.

The motion is denied. Dated, December 23, 1936.

(Signed) John M. Sternhagen,

Member.

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Before United States Board of Tax Appeals

Docket No. 75816

Docket No. 77375

Docket No. 77376

Docket No. 77377

.217

Docket No. 80769

[Titles omitted.]

Order denying motion for reconsideration

In the respondent's "motion for reconsideration," filed November 27, 1936, to which the petitioners filed opposition on December 22, 1936, there is nothing which has not heretofore been fully submitted to the Board and considered by it in reaching its decision. Although the Board's opinion was deliberately made brief, it nevertheless disposes of all of the arguments presented in either the original submission or the present motion.

The motion is denied.

Dated, December 23, 1936.

(Signed) JOHN M. STERNHAGEN,

Member.

218 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 77375

[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

Your petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. Your respondent on

and an inhabitant of the City of Brooklyn, State of New York, and filed his income tax return for the year in question with the Collector of Internal Revenue for the First District of New York, whose office is located in the City of Brooklyn, New York, and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner determined a deficiency in Federal income taxes against the taxpayer for the calendar year 1933 in the amount of \$232.74, and on July 31, 1934, in accordance with the provisions of Section 272 of the Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on September 19, 1934, the taxpayer filed an appeal from said notice of deficiency to the United States Board of Tax Appeals, being Docket No. 77375. Said appeal was consolidated for hearing and decision with the appeals of four other taxpayers whose appeals were presented simultaneously to the Board.

On October 28, 1936, the Board of Tax Appeals promulgated its opinion, and on October 31, 1936, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that there was no deficiency in tax against the taxpayer for said year. The opinion of the Board of Tax Appeals

is reported at 34 B. T. A. No. 187.

On November 20, 1936, the Commissioner filed a Motion for Amended and Specific Findings of Fact setting forth in detail and in particular wherein the Board of Tax Appeals had failed to make correct and adequate findings of material facts based upon the Stipulation of Facts and upon other evidence of record. On November 27, 1936, the Commissioner filed a Motion for Reconsideration of the cases based upon said Amended and Specific Findings of Fact. Both of said motions of the Commissioner were denied by the Board on December 23, 1936.

The nature of the controversy is as follows:

III

Taxpayer is an individual, an industrial consultant by profession, and during the year in question was employed by the Port of New York Authority in connection with the operation and rental of the Commerce Building and Inland Terminal No. 1. For his services as such, taxpayer received during the year in question a compensation of \$8,137.50 which was paid out of the operating revenues of the Port Authority.

The Port of New York Authority is a corporate body organized pursuant to a Compact entered into between the States of New York and New Jersey. The Port Authority was designed and intended

under the terms of said Compact to bring about "a better coordination of the terminal, transportation, and other facilities of commerce

in and about the Port of New York." It was given power and authority "to purchase, construct, lease, and/or operate any terminal or transportation facility within said district and to make charges for the use thereof," and for such purposes only to own, lease, and operate real or personal property, or borrow money

and secure same by bonds or mortgages on said property.

The Compact provided that the powers granted by it to the Port Authority should not be exercised until the Legislature of the two States should approve a Comprehensive Plan for the general development of the Port. The Comprehensive Plan as later adopted by the two States was not the agenda or program of the Port Authority alone, but all of the municipalities within the Port District were also authorized and empowered to cooperate and carry out and effectuate the Comprehensive Plan. The Comprehensive Plan provided a-general scheme or plan for the development of the Port Authority and laid down nine "Principles to Govern the Development." The Comprehensive Plan expressly and specifically set forth that "the bridges, tunnels, and belt lines forming the Comprehensive Plan" should be as outlined therein. The physical projects outlined therein which comprised the Comprehensive Plan were largely, if not exclusively, railroad, transportation, or terminal facilities, and had nothing directly to do with the harbor, channel, or seaport of the City of New York. All of the nine "Principles to Govern the Development" have to do with terminal, transportation, and railroad facilities solely.

Under the Compact therefore, and under the Comprehensive
Plan, it is clear that the Port Authority was created as the
solution for the complex railroad, terminal, and transportation problems in and around New York City, and that the Powers
given to the Port Authority were largely in connection with and
related to such railroad, terminal, and transportation problems.

In subsequent years the Port Authority was given authority by the Legislatures of the two States to undertake certain other and additional projects. These additional projects were largely in connection with the furnishing of rapid transit facilities for the City of New York. In 1924 Acts were passed authorizing the Port Authority to construct and operate the two bridges between the Sta es of New Jersey and New York now known as the Outerbridge Crossing and the Goethals Bridge. In 1925 the Legislatures of the two States authorized the Port Authority to construct and operate the George Washington Bridge across the Hudson River between Fort Lee, New Jersey, and Manhattan Island, New York. In 1925 the Legislatures of the two States authorized the Port Authority to construct and operate the Bayonne Bridge between Bayonne, New Jersey, and Staten Island, New York. All of said four bridges were financed in part by advances from the two States which have since been repaid and in part from the proceeds of bonds issued by

the Port Authority. All of said bridges were constructed by the Port Authority, and during the years in question were operated by it, charging the public a toll upon each vehicle or each person using said facilities.

In addition to the foregoing facilities, the Port Authority was authorized by the Legislatures of the two States in 1931

to take over the operation of the Holland Tunnel. tunnel was constructed by a commission from each of the two States through direct appropriations of the State of New York and through a bond issue of the State of New Jersey. Upon taking over the Holland Tunnel in 1931, the Port Authority assumed all of the cost thereof and issued bonds with the proceeds of which the cost to each State was refunded. The Port Authority charges tolls to the general public for the use of said tunnel.

In actual practice these four bridges and tunnel above referred to are operated as rapid transit facilities for the transportation of packaged freight and commuters into New York City. More than 80% of the vehicles using the Port Authority facilities are passenger automobiles and buses. In addition thereto the Port Authority put into operation during the years in question a bus line known as the Goethals Bridge Bus Line exclusively for the use of passengers.

All of the various transportation and terminal facilities of the Port Authority are by statute made subject to the jurisdiction and regulation of the public service, public utility, and like State Commissions of the States of New York and New Jersey to the same extent as those of a private corporation. The rates and charges and the amount of tolls charged by the Port Authority are subject to regulation by said public utility commissions.

In 1930 the Legislatures of the two States authorized the Port Authority to construct and operate a second tunnel under the Hudson River between Weehawken, New Jersey, and Manhattan, New York, known as the Midtown Tunnel. This tunnel

was in process of construction during the years in question and was financed by a loan from the Federal Public Works Administration to

the Port Authority.

As the keystone of its objective to coordinate and simplify the transportation and terminal facilities in the Port District, the Port Authority has made certain plans to connect existing railroads and terminals by a series of belt lines running through tunnels and other proposed connections. In furtherance of the plan the Port Authority investigated the possibility of an automatic underground electric system but abandoned it in favor of a system of inland terminals served by motor vehicles.

In 1931 the Port Authority acquired certain real estate on Manhattan by condemnation, and erected thereon a large office, loft, and warehouse building known as the "Commerce Building and Inland Terminal No. 1." Under a contract with eight trunk line railroads, the first floor and basement of the building was leased for use as a joint inland terminal for packaged freight. The remainder of the

building is leased by the Port Authority to the general public for manufacturing, loft, and mercantile purposes. The inland terminal portion of the building was designed to simplify and coordinate the complex terminal facilities of the several railroads entering the Port District and to relieve harbor and street congestion in and around

the City of New York.

The Port Authority has never participated in any maritime or seaport activities and neither owns nor operates any marine or seaport facilities. It neither owns nor operates any dredges, tugs, ferries, ships, boats, piers, or other marine facilities. It has never dredged, deepened, or widened any channels, waterways, or seaport facilities of any kind. It has never established nor attempted to operate nor regulate any of the seaport facilities in the Port District. It has never established nor operated any buoys, lights, bells, whistles, or channel markers of any sort in connection with the harbor or channel of the Port District. It has never spent any substantial sum on any such marine or seaport facilities. In short, the Port Authority is not a seaport authority at all but a body owning and operating railroad terminals and land transportation facilities only.

In addition to construction and operation of its several transportation and terminal facilities, the Port Authority has certain advisory and supervisory functions. It has conducted studies to improve general transportation conditions in the Port District, to reduce living costs, and to enable the Port of New York to meet competition of other ports. It has made studies and surveys in connection with piers and docks in connection with channel widening and deepening and in connection with railroad marine activities. It has studied the prolem of harbor congestion and the transportation of explosives and chemicals and has assisted the Federal Government in making

regulations therefor. It has made studies of pier terminals and suggested regulations for the storage of freight therein to relieve the congestion in such terminals. It has prepared reports on the location of free ports or tariff zones, and gratuitously

cooperates with and advises the municipalities of the Port District as to their problems of port development.

The Port Authority has participated and given evidence in actions before the Interstate Commerce Commission brought by competitive ports to obtain more favorable rates. It coordinates and assists in litigation affecting commerce, but does not supplant the functions of the several municipalities, the States, and such agencies as Chambers of Commerce, Produce Exchange, and Maritime Exchange of the Port District.

The revenues of the Port Authority are derived primarily from tolls which it charges the public for the use of its various transportation and terminal facilities and from the rentals of the Commerce Building, and secondarily from rentals of other real estate,

interest on securities owned by it, interest on bank balances, bus line

fares, and state advances which, however, ceased in 1934.

Based upon the foregoing facts the Commissioner determined that the construction and operation of such railroad, terminal, and transportation facilities by the Port Authority was not the exercise of Governmental functions of the States of New York and New Jersey, and hence determined that the compensation of each of the taxpayers was subject to Federal income taxation.

In the proceeding before the Board the taxpayers contended that they were officers and employees of the Port of New York

Authority, that the Port Authority was an agency of the States of New York and New Jersey, that the several bridges, tunnels, and terminal facilities and Commerce Building were erected and operated in the public interest and because of the necessity of relieving the Port District of street, highway, and harbor congestion, and hence that the erection and operation of said facilities was an exercise of the Governmental functions of the two States, and that the taxpayers' compensation paid by the Port Authority was exempt under the Constitution from Federal income taxation.

The Commissioner contended:

1. That the various activities of the Port Authority are all instrumentalities of Interstate Commerce and they are not immune from Federal income taxation because Congress has supreme and plenary

power of such instrumentalities.

2. The various activities of the Port Authority consisted principally, if not entirely, in the furnishing of railroad and rapid transit facilities to the public for hire, and hence its employees are not immune from Federal income taxation because the furnishing of means of transportation and rapid transit facilities is not a Governmental function.

3. The Port Authority has numerous facilities, and the immune character of each facility from the operation of which the compensation of the taxpayers was derived must be separately

proven by the taxpayers.

4. The Port Authority is a self-sustaining, self-perpetuating body, not dependent upon the States or their citizens for its support. Federal income tax levied upon the compensation paid to its employees being a nondiscriminatory tax in its nature would impose no burden upon either State, and, hence the compensation of such employees is not exempt from Federal income taxation.

5. Taxpayers' claim of immunity from Federal income taxation places in issue the constitutionality of the Revenue Acts and puts the burden upon the taxpayers of proving their unconstitutionality.

The Board held that it was bound by its prior decisions in the cases of Leon Moisseiff, 21 B. T. A. 515 and Robert Carey, 31 B. T. A. 839, and therefore decided the cases in favor of the taxpayers.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occur ed and intervened to the prejudice of the Commissioner, and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision and final order, of redetermination so entered by the Board, to wit:

229 1. The Board erred in holding that the compensation received by these taxpayers for services rendered during the years in question as employees of the Port of New York Authority

was exempt from Federal income taxation.

2. The Board erred in holding that the Port Authority was organized for and operated in the traditionally sovereign function of protecting, improving, and developing the Port of New York.

3. The Board erred in failing to hold that the sovereign function of protecting, improving, and developing seaports is committed by the Constitution to Congress and the Federal Government.

4. The Board erred in holding that the functions exercised by the Port of New York Authority during the years in question were Governmental functions of the States of New York and New Jersey.

5. The Board erred in failing to hold that the functions exercised by the Port Authority during said years were primarily in connection with the furnishing of railroad, terminal, and transportation facilities, and, hence, in the nature of private business.

6. The Board erred in holding that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of Governmental or sovereign func-

tions of the States of New York and New Jersey.

230 7. The Board erred in failing to hold that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of the corporate or proprietary functions of the two States.

· 8. The Board erred in holding that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constituted the exercise of the Governmental functions of the two States.

9. The Board erred in failing to hold that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constitute public utilities, and, hence, were not the exercise of the Government functions of the two States.

10. The Board erred in holding that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 during the years in question for the housing of railroad terminals and the renting of loft and manufacturing space to the general public constituted the exercise of Governmental functions of the two States.

11. The Board erred in failing to hold that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 as aforesaid constitute a private or

corporate undertaking, and, hence, were not the exercise of

the Governmental functions of the two States.

12. The Board erred in holding that the construction and operation of its several facilities by the Port Authority during the years in question were part of the sovereign functions of the two States in improving, protecting, and developing the Harbor of New York.

13. The Board erred in failing to hold that the construction and operation of said facilities by the Port Authority were not a part of the "traditional supervision exercised by government over seaports" and, hence, not an exercise of a Governmental function.

14. The Board erred in failing to make findings of fact as to numerous material facts stipulated by the parties and incorporated

in the Stipulations of Facts filed with the Board.

15. The Board erred in failing to make findings of fact as to numerous material facts of record, which facts are set forth in detail in the Commissioner's Motion for Amended and Specific Findings

16. The Board erred in failing to grant the Commissioner's Motion

for Amended and Specific Findings of Fact.

17. The Board erred in failing to grant the Commissioner's Motion for Reconsideration of the cases, based upon said Amended and Specific Findings of Fact.

18. The Board erred in failing to find for the Commissioner upon

all the facts of record.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

(Signed) ROBERT H. JACKSON, Assistant Attorney General. (Signed) MORRISON SHAFROTH, Chief Counsel; Bureau of Internal Revenue. GEORGE D. BRABSON. Special Attorney. Bureau of Internal Revenue.

GDB/MEP 1-15-37.

[Duly sworn to by George D. Brabson; jurat omitted in printing.]

234 In United States Circuit Court of Appeals, for the the Second Circuit

B. T. A. Docket No. 77375

(Title omitted.)

Notice of filing petition for review

To: Mr. PHILIP L. GERHARDT,

111 Eighth-Avenue, New York, New York.

Mr. JULIUS HENRY COHEN,

111 Eighth Avenue, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue, did on the 25th day of January 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you. Dated this 25th day of January 1937.

(Signed). Morrison Shafroth, Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 27th day of January 1937.

PHILIP L. GERHARDT,

Respondent on Review.

JULIUS HENRY COHEN,

Attorney for Respondent on Review.

1-21-37.

236 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 77377

[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue,

and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

Ι

Your petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States. Your 237 respondent on review, hereinafter referred to as the taxpayer, is an individual and an inhabitant of the City of New York, State of New York, and filed his income tax return for the year in question with the Collector of Internal Revenue for the Third District of New York, whose office is located in the City of New York, New York, and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner determined a deficiency and penalty in Federal income taxes against the taxpayer for the calendar year 1933 in the amounts of \$733.14 and \$183.29, respectively, and on July 31, 1934, in accordance with the provisions of Section 272 of the Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency and penalty. Thereafter on September 19, 1934, the taxpayer filed an appeal from said notice of deficiency to the United States Board of Tax Appeals, being Docket No. 77377. Said appeal was consolidated for hearing and decision with the appeals of four other taxpayers whose appeals were presented simultaneously to the Board.

On October 28, 1936, the Board of Tax Appeals promulgated its opinion, and on October 31, 1936, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that there was no deficiency in tax against the taxpayer for said year. The opinion of the Board of Tax Appeals is

reported at 34 B. T. A. No. 187.

On November 20, 1936, the Commissioner filed a Motion for Amended and Specific Findings of Fact setting forth in detail and in particular wherein the Board of Tax Appeals had failed to make correct and adequate findings of material facts based upon the Stipulation of Facts and upon other evidence of record. On November 27, 1936, the Commissioner filed a Motion for Reconsideration of the cases based upon said Amended and Specific Fndings of Fact. Both of said motions of the Commissioner were denied by the Board on December 23, 1936.

III

The nature of the controversy is as follows:

Taxpayer is an individual, and during the year in question was employed by the Port of New York Authority as assistant general manager. For his services as such, taxpayer received during the year in question a compensation of \$14,625.00, paid out of the operating revenues of the Port Authority.

The Port of New York Authority is a corporate body organized pursuant to a Compact entered into between the States of New York and New Jersey. The Port Authority was designed and intended under the terms of said Compact to bring about "a better coordination of the terminal, transportation, and other facilities of com-

merce in and about the Port of New York." It was given
239 power and authority "to purchase, construct, lease, and/or
operate any terminal or transportation facility within said
district and to make charges for the use thereof," and for such purposes only to own, lease, and operate real or personal property, or
borrow money and secure same by bonds or mortgages on said

property.

The Compact provided that the powers granted by it to the Port Authority should not be exercised until the Legislatures of the two States approve a Comprehensive Plan for the general development of the Port. The Comprehensive Plan as later adopted by the two States was not the agenda or program of the Port Authority alone, but all of the municipalities within the Port District were also authorized and empowered to cooperate and carry out and effectuate the Comprehensive Plan. The Comprehensive Plan provided a general scheme or plan for the development of the Port Authority and. laid down nine "Principles to Govern the Development." The Comprehensive plan expressly and specifically set forth that "the bridges, tunnels, and belt lines forming the Comprehensive Plan" should be as outlined therein. The physical projects outlined therein which comprised the Comprehensive Plan were largely, if not exclusively, railroad, transportation or terminal facilities, and had nothing directly to do with the harbor, channel, or seaport of the City of New All of the nine "Principles to Govern the Development" have to do with terminal, transportation, and railroad facilities solely.

Under the Compact therefore, and under the Comprehensive Plan, it is clear that the Port Authority was created as the solution for the complex railroad, terminal, and transportation problems in and around New York City, and that the powers given to the Port Authority were largely in connection with and related to such railroad, terminal, and transportation problems.

In subsequent years the Port Authority was given authority by the Legislatures of the two States to undertake certain other and additional projects. These additional projects were largely in connection with the furnishing of rapid transit facilities for the City of New York. In 1924, Acts were passed authorizing the Port Authority to construct and operate the two bridges between the States of New Jersey and New York now known as the Outerbridge Crossing and the Goethals Bridge. In 1925, the Legislatures of the two States authorized the Port Authority to construct and operate the George Washington Bridge across the Hudson River between Fort Lee, New Jersey, and Manhattan Island, New York. In 1925, the Legislatures of the two States authorized the Port Authority to construct and oper-

ate the Bayonne Bridge between Bayonne, New Jersey, and Staten Island, New York. All of said four bridges were financed in part by advances from the two States which have since been repaid and in part from the proceeds of bonds issued by the Port Authority. All of said bridges were constructed by the Port Authority, and during the years in question were operated by it, charging the public a toll upon each vehicle or each person using said facilities.

In addition to the foregoing facilities, the Port Authority was authorized by the Legislatures of the two States in 1931 to take over the operation of the Holland Tunnel. This tunnel was constructed by a commission from each of the two States through direct appropriations of the State of New York and through a bond issue of the State of New Jersey. Upon taking over the Holland Tunnel in 1931, the Port Authority assumed all of the cost thereof and issue bonds with the proceeds of which the cost to each State was refunded. The Port Authority charges tolls to the general public for the use of said tunnel.

In actual practice these four bridges and tunnel above referred to are operated as rapid transit facilities for the transportation of packaged freight and commuters into New York City. More than 80% of the vehicles using the Port Authority facilities are passenger automobiles and buses. In addition thereto the Port Authority put into operation during the years in question a bus line known as the Goethals Bridge Bus Line exclusively for the use of passengers.

All of the various transportation and terminal facilities of the Port Authority are by statute made subject to the jurisdiction and regulation of the public service, public utility, and like State Commissions of the States of New York and New Jersey to the same extent as those of a private corporation. The rates and charges and the amount of tolls charged by the Port Authority are subject to

regulation by said public utility commissions.

Port Authority to construct and operate a second tunnel under the Hudson River between Weehawken, New Jersey, and Manhattan, New York, known as the Midtown Tunnel. This tunnel was in process of construction during the years in question and was financed by a loan from the Federal Public Works Administration to the

Port Authority.

As the keystone of its objective to coordinate and simplify the transportation and terminal facilities in the Port District, the Port Authority has made certain plans to connect existing railroads and terminals by a series of belt lines running through tunnels and other proposed connections. In furtherance of the plan the Port Authority investigated the possibility of an automatic underground electric system but abandoned it in favor of a system of inland terminals served by motor vehicles.

In 1931 the Port Authority acquired certain real estate on Manhattan by condemnation, and erected thereon a large office, loft, and warehouse building known as the "Commerce Building and Inland Terminal No. 1." Under a contract with eight trunk line railroads, the first floor and basement of the building was leased for use as a joint inland terminal for packaged freight. The remainder of the building is leased by the Port Authority to the general public for manufacturing, loft, and mercantile purposes. The inland terminal

portion of the building was designed to simplify and coordinate the complex terminal facilities of the several railroads entering the Port District and to relieve harbor and street

congestion in and around the City of New York.

The Port Authority has never participated in any maritime or seaport activities and neither owns nor operates any marine or seaport facilities. It neither owns nor operates any dredges, tugs, ferries, ships, boats, piers, or other marine facilities. It has never dredged, deepened, or widened any channels, waterways, or seaport facilities of any kind. It has never established nor attempted to operate nor regulate any of the seaport facilities in the Port District. It has never established nor operated any buoys, lights, bells, whistles, or channel markers of any sort in connection with the harbor or channel of the Port District. It has never spent any substantial sum on any such marine or seaport facilities. In short, the Port Authority is not a seaport authority at all but a body owning and operating railroad terminals and land transportation facilities only.

In addition to construction and operation of its several transportation and terminal facilities, the Port Authority has certain advisory and supervisory functions. It has conducted studies to improve general transportation conditions in the Port District, to reduce living costs, and to enable the Port of New York to meet competition of other ports. It has made studies and surveys in connection with piers and docks, in connection with channel widening

and deepening and in connection with railroad marine activities.

It has studied the problem of harbor congestion and the transportation of explosives and chemicals and has assisted the Federal Government in making regulations therefor. It has made studies of pier terminals and suggested regulations for the storage of freight therein to relieve the congestion in such terminals. It has prepared reports on the location of free ports or tariff zones, and gratuitously cooperates with and advises the municipalities of the Port District as to their problems of port development.

The Port Authority has participated and given evidence in actions before the Interstate Commerce Commission brought by competitive ports to obtain more favorable rates. It coordinates and assists in litigation affecting commerce, but does not supplant the functions of the several municipalities, the States, and such agencies as Chambers of Commerce, Produce Exchange, and Maritime Exchange of the Port District.

The revenues of the Port Authority are derived primarily from tolls which it charges the public for the use of its various transpor-

tation and terminal facilities and from the rentals of the Commerce Building, and secondarily from rentals of other real estate, interest on securities owned by it, interest on bank balances, bus line fares, and state advances which, however, ceased in 1934.

Based upon the foregoing facts, the Commissioner determined that the construction and operation of such railroad, terminal, and transportation facilities by the port Authority was not the exercise

of Governmental functions of the States of New York and New Jersey, and hence determined that the compensation of 245 each of the taxpayers was subject to Federal income taxation.

In the proceeding before the Board the taxpayers contended that they were officers and employees of the Port of New York Authority, that the Port Authority was an agency of the States of New York and New Jersey, that the several bridges, tunnels, and terminal facilities and Commerce Building were erected and operated in the public interest and because of the necessity of relieving the Port District of street, highway, and harbor congestion, and hence that the erection and operation of said facilities was an exercise of the Governmental, functions of the two States, and that the taxpayers' compensation paid by the Port Authority was exempt under the Constitution from Federal income taxation.

The Commissioner contended:

1. That the various activities of the Port Authority are all instrumentalities of Interstate Commerce and they are not immune from Federal income taxation because Congress has supreme and plenary

power of such instrumentalities.

2. The various activities of the Port Authority consisted principally, if not entirely, in the furnishing of railroad and rapid transit facilities to the public for hire, and hence its employees are not immune from Federal income taxation because the furnishing of means of transportation and rapid transit facilities is not a Governmental function.

3. The Port Authority has numerous facilities, and the immune character of each facility from the operation of which the compensation of the taxpayers was derived must be separately

proven by the taxpayers.

4. The Port Authority is a self-sustaining, self-perpetuating body, not dependent upon the States or their citizens for its support. Federal income tax levied upon the compensation paid to its employees being a non-discriminatory tax in its nature would impose no burden upon either State, and hence the compensation of such employees is not exempt from Federal income taxation.

5. Taxpayers' claim of immunity from Federal income taxation places in issue the constitutionality of the Revenue Acts and puts the burden upon the taxpayers of proving their unconstitutionality.

The Board held that it was bound by its prior decisions in the cases of Leon Moisseiff, 21 B. T. A. 515 and Robert Carey 31, B. T. A. 839, and therefore decided the cases in favor of the taxpayers.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occurred and

intervened to the prejudice of the Commissioner, and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision, and final

order of redetermination so entered by the Board, to wit:

1. The Board erred in holding that the compensation received by these taxpayers for services rendered during the years in question as employees of the Port of New York Authority was exempt from Federal income taxation.

2. The Board erred in holding that the Port Authority was organized for and operated in the traditionally sovereign function of pro-

tecting, improving, and developing the Port of New York.

3. The Board erred in failing to hold that the sovereign function of protecting, improving, and developing seaports is committed by the Constitution to Congress and the Federal Government.

4. The Board erred in holding that the functions exercised by the Port of New York Authority during the years in question were Governmental functions of the States of New York and New Jersey.

5. The Board erred in failing to hold that the functions exercised by the Port Authority during said years were primarily in connection with the furnishing of railroad, terminal, and transportation facilities, and, hence, in the nature of private business.

6. The Board erred in holding that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of Governmental or

sovereign functions of the States of New York and New Jersey.

7. The Board erred in failing to hold that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of the corporate or proprietary

functions of the two States.

8. The Board erred in holding that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constituted the exercise of the Governmental functions of the two States.

9. The Board erred in failing to hold that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constitute public utilities, and, hence, were not the exercise of the

Governmental functions of the two States.

10. The Board erred in holding that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 during the years in question for the housing of railroad terminals and the renting of loft and manufacturing space to the general public constituted the exercise of Governmental functions of the two States.

11. The Board erred in failing to hold that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 as aforesaid constitute a private or corporate undertaking, and, hence, were not the exercise of the

Governmental functions of the two States.

12. The Board erred in holding that the construction and operation of its several facilities by the Port Authority during the years in question were part of the sovereign functions of the two States in improving, protecting, and developing the Harbor of New York.

13. The Board erred in failing to hold that the construction and operation of said facilities by the Port Authority were not a part of the "traditional supervision exercised by government over seaports"

and, hence, not an exercise of a Governmental function.

14. The Board erred in failing to make findings of fact as to numerous material facts stipulated by the parties and incorporated

in the Stipulations of Facts filed with the Board.

15. The Board erred in failing to make findings of fact as to numerous material facts of record, which facts are set forth in detail in the Commissioner's Motion for Amended and Specific Findings of Fact.

16. The Board erred in failing to grant the Commissioner's Mo-

tion for Amended and Specific Findings of Fact.

17. The Board erred in failing to grant the Commissioner's Motion for Reconsideration of the cases, based upon said Amended and Specific Findings of Fact.

18. The Board erred in failing to find for the Commissioner upon

all the facts of record.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

(Signed) ROBERT H. JACKSON. Robert H. Jackson, Assistant Attorney General.

(Signed) MORRISON SHAFROTH, Morrison Shafroth. Chief Counsel,

Bureau of Internal Revenue.

(Sgd.) 'GEORGE D. BRABSON, George D. Brabson, Special Attorney, Bureau of Internal Revenue.

GDB/MKP 1-15-37.

[Duly sworn to by George D. Brabson; jurat omitted in printing.]

252 United States Circuit Court of Appeals, For the Second Circuit

B. T. A. Docket No. 77377

[Title omitted.]

Notice of filing petition for review

To: Mr. BILLINGS WILSON,

111 Eighth Avenue, New York, New York.

Mr. JULIUS HENRY COHEN,

111 Eighth Avenue, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did on the 25th day of January 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 25th day of January 1937.

(Signed) Morrison Shafroth.
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 27th, day of January 1937.

BILLINGS WILSON,
Respondent on Review.
JULIUS HENRY COHEN,
Attorney for Respondent on Review.

GDE/MKP 1-21-37.

254 In United States Circuit Court of Appeals, for the Second Circuit

B. T. A. Docket No. 80769

[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

Your petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States. Your respondent on 255 review, hereinafter referred to as the taxpayer, is an individual and an inhabitant of the City of New York, State of New York, and filed his income tax return for the year in question with the Collector of Internal Revenue for the Second District of New York, whose office is located in the City of New York, New York, and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

H

The Commissioner determined a deficiency and penalty in Federal income taxes against the taxpayer for the calendar year 1932 in the amounts of \$695.00 and \$173.75; respectively, and on April 24, 1935, in accordance with the provisions of Section 272 of the Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency and penalty. Thereafter, on July 15, 1935, the taxpayer filed an appeal from said notice of deficiency to the United States Board of Tax Appeals, being Docket No. 80769. Said appeal was consolidated for hearing and decision with the appeals of four other taxpayers whose appeals were presented simultaneously to the Board.

On October 28, 1936, the Board of Tax Appeals promulgated its opinion, and on October 31, 1936, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that there was no deficiency in tax against the txapayer for said year. The opinion of the Board of Tax Appeals

is reported at 34 B. T. A. No. 187.

On November 20, 1936, the Commissioner filed a Motion for Amended and Specific Findings of Fact setting forth in detail and in particular wherein the Board of Tax Appeals had failed to make correct and adequate findings of material facts based upon the Stipulation of Facts and upon other evidence of record. On November 27, 1936, the Commissioner filed a Motion for Reconsideration of the cases based upon said Amended and Specific Findings of Fact. Both of said motions of the Commissioner were denied by the Board on December 23, 1936.

III

The nature of the controversy is as follows:

Taxpayer is an individual, and during the year in question was employed by the Port of New York Authority as assistant general manager. For his services as such, taxpayer received during the year in question a compensation of \$10,950.00 paid out of the operating revenues of the Port Authority.

The Port of New York Authority is a corporate body organized pursuant to a Compact entered into between the States of New York

and New Jersey. The Port Authority was designed and intended under the terms of said Compact to bring about "a better cordination of the terminal, transportation, and other facilities of commerce in and about the Port of New York." It was given power and

authority "to purchase, construct, lease, and/or operate any terminal or transportation facility within said district and to make charges for the use thereof," and for such purposes only to own, lease, and operate real or personal property, or borrow money

and secure same by bonds or mortgages on said property.

The Compact provided that the powers granted by it to the Port Authority should not be exercised until the Legislatures of the two States should approve a Comprehensive Plan for the general development of the Port. The Comprehensive Plan as later adopted by the two States was not the agenda or program of the Port Authority alone, but all of the municipalities within the Port District were also authorized and empowered to cooperate and carry out and effectuate the Comprehensive Plan. The Comprehensive Plan provided a general scheme or plan for the development of the Port Authority and laid down nine "Principles to Govern the Development." The Comprehensive Plan expressly and specifically set forth that "the bridges, tunnels and belt lines forming the Comprehensive Plan" should be as outlined therein. The physical projects outlined therein which comprised the Comprehensive Plan were largely, if not exclusively, railroad, transportation or terminal facilities, and had nothing directly to do with the harbor, channel, or seaport of the City of New York. All of the nine "Principles to Govern the Development" have to do with terminal, transportation, and railroad facilities solely.

Under the Compact therefore, and under the Comprehen258 sive Plan, it is clear that the Port Authority was created as
the solution for the complex railroad, terminal, and transportation problems in and around New York City, and that the
powers given to the Port Authority were largely in connection with
and related to such railroad, terminal, and transportation problems.

In subsequent years the Port Authority was given authority by the Legislature of the two States to undertake certain other and additional projects. These additional projects were largely in connection with the furnishing of rapid transit facilities for the City of New York. In 1924, Acts were passed authorizing the Port Authority to construct and operate the two bridges between the States of New Jersey and New York now known as the Outerbridge Crossing and the Goethals Bridge. In 1925, the Legislatures of the two States authorized the Port Authority to construct and operate the George Washington Bridge across the Hudson River between Fort Lee, New Jersey and Manhattan Island, New York. In 1925, the Legislatures of the two States authorized the Port Authority to construct and operate the Bayonee Bridge between Bayonne, New Jersey and Staten Island, New York. All of said four bridges were financed in part by advances from the two States which have

since been repaid and in part from the proceeds of bonds issued by the Port Authority. All of said bridges were constructed by the Port Authority, and during the years in question were operated by it, charging the public a toll upon each vehicle or each person

using said facilities.

259 In addition to the foregoing facilities, the Port Authority was authorized by the Legislature of the two States in 1931 to take over the operation of the Holland Tunnel. This tunnel was constructed by a commission from each of the two States through direct appropriations of the State of New York and through a bond issue of the State of New Jersey. Upon taking over the Holland Tunnel in 1931, the Port Authority assumed all of the cost thereof and issued bonds with the proceeds of which the cost to each State was refunded. The Port Authority charges tolls to the general public for the use of said tunnel.

In actual practice these four bridges and tunnel above referred to are operated as rapid transit facilities for the transportation of packaged freight and commuters into New York City. More than 80% of the vehicles using the Port Authority facilities are passenger automobiles and buses. In addition thereto the Port Authority put into operation during the years in question a bus line known as the Goethals Bridge Bus Line exclusively for the use of passengers.

All of the various transportation and terminal facilities of the Port Authority are by statute made subject to the jurisdiction and regulation of the public service, public utility, and like State Commissions of the States of New York and New Jersey to the same extent as those of a private corporation. The rates and charges and the amount of tolls charged by the Port Authority are subject to

regulation by said public utility commissions.

Port Authority to construct and operate a second tunnel under the Hudson River between Weehawkeen, New Jersey and Manhattan, New York, known as the Midtown Tunnel. This tunnel was in process of construction during the years in question and was financed by a loan from the Federal Public Works Administration to the Port Authority.

As the keystone of its objective to coordinate and simplify the transportation and terminal facilities in the Port District, the Port Authority has made certain plans to connect existing railroads and terminals by a series of belt lines running through tunnels and other proposed connections. In furtherance of the plan the Port Authority investigated the possibility of an automatic underground electric system but abandoned it in favor of a system of inland terminals served by motor vehicles.

In 1931, the Port Authority acquired certain real estate on Manhattan by condemnation, and erected thereon a large office, loft, and warehouse building known as the "Commerce Building and Inland Terminal No. 1." Under a contract with eight trunk line railroads, the first floor and basement of the building was leased for use as a

joint inland terminal for packaged freight. The remainder of the building is leased by the Port Authority to the general public for manufacturing, loft, and mercantile purposes. The inland terminal

portion of the building was designed to simplify and coordinate the complex terminal facilities of the several railroads entering the Port District and to relieve harbor and street

congestion in and around the City of New York.

The Port Authority has never participated in any maritime or seaport activities and neither owns nor operates any marine or seaport facilities. It neither owns nor operates any dredges, tugs, ferries, ships, boats, piers, or other marine facilities. It has never dredged, deepened, or widened any channels, waterways or seaport facilities of any kind. It has never established nor attempted to operate nor regulate any of the seaport facilities in the Port District. It has never established nor operated any buoys, lights, bells, whistles, or channel markers of any sort in connection with the harbor or channel of the Port District. It has never spent any substantial sum on any such marine or seaport facilities. In short, the Port Authority is not a seaport authority at all but a body owning and operating railroad terminals and land transportation facilities only.

In addition to construction and operation of its several transportation and terminal facilities, the Port Authority has certain advisory and supervisory functions. It has conducted studies to improve general transportation conditions in the Port District, to reduce living costs, and to enable the Port of New York to meet competition of other ports. It has made studies and surveys in connection with piers and docks in connection with channel widening and deepening and in connection with railroad marine activities. It

has studied the problem of harbor congestion and the transportation of explosives and chemicals and has assisted the

Federal Government in making regulations therefor. It has made studies of pier terminals and suggested regulations for the storage of freight therein to relieve the congestion in such terminals. It has prepared reports on the location of free ports or tariff zones, and gratuitously cooperates with and advises the municipalities of the Port District as to their problems of port development.

The Port Authority has participated and given evidence in actions before the Interstate Commerce Commission brought by competitive ports to obtain more favorable rates. It coordinates and assists in litigation affecting commerce, but does not supplant the functions of the several municipalities, the States, and such agencies as Chambers of Commerce, Produce Exchange, and Maritime Exchange of the Port District.

The revenues of the Port Authority are derived primarily from tolls which it charges the public for the use of its various transportation and terminal facilities and from the rentals of the Commerce Building, and secondarily from rentals of other real estate, interest on securities owned by it, interest on bank balances, bus line fares, and state advances which, however, ceased in 1934.

Based upon the foregoing facts the Commissioner determined that the construction and operation of such railroad, terminal, and transportation facilities by the Port Authority was not the exercise of Governmental functions of the States of New York and New Jersey, and hence determined that the compensation of each of the

taxpayers was subject to Federal income taxation.

that they were officers and employees of the Port of New York Authority, that the Port Authority was an agency of the States of New York and New Jersey, that the several bridges, tunnels, and terminal facilities and Commerce Building were erected and operated in the public interest and because of the necessity of relieving the Port District of street, highway, and harbor congestion, and hence that the erection and operation of said facilities was an exercise of the Governmental functions of the two States, and that the taxpayers' compensation paid by the Port Authority was exempt under the Constitution from Federal income taxation.

The Commissioner contended:

1. That the various activities of the Port Authority are all instrumentalities of Interstate Commerce and they are not immune from Federal income taxation because Congress has supreme and plenary

power of such instrumentalities.

2. The various activities of the Port Authority consisted principally, if not entirely, in the furnishing of railroad and rapid transit facilities to the public for hire, and hence its employees are not immune from Federal income taxation because the furnishing of means of transportation and rapid transit facilities is not a Governmental function.

3. The Port Authority has numerous facilities, and the immune character of each facility from the operation of which the compensation of the taxpayers was derived must be sepa-

rately proven by the taxpayers.

4. The Port Authority is a self-sustaining, self-perpetuating body, not dependent upon the States or their citizens for its support. Federal income tax levied upon the compensation paid to its employees being a non-discriminatory tax in its nature would impose no burden upon either State, and hence the compensation of such employees is not exempt from Federal income taxation.

5. Taxpayers' claim of immunity from Federal income taxation places in issue the constitutionality of the Revenue Acts and puts the burden upon the taxpayers of proving their unconstitutionality.

The Board held that it was bound by its prior decisions in the cases of Leon Moisseiff, 21 B. T. A. 515, and Robert Carey, 31 B. T. A. 839, and therefore decided the cases in favor of the taxpayers.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occurred and intervened to the prejudice of the Commissioner and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision, and final order of redetermina-

tion so entered by the Board, to wit:

265 1. The Board erred in holding that the compensation received by these taxpayers for services rendered during the years in question as employees of the Port of New York Authority was exempt from Federal income taxation.

2. The Board erred in holding that the Port Authority was organized for and operated in the traditionally sovereign function of protecting, improving and developing the Port of New York.

3. The Board erred in failing to hold that the sovereign function of protecting, improving and developing seaports is committed by the Constitution to Congress and the Federal Government.

4. The Board erred in holding that the functions exercised by the Port of New York Authority during the years in question were Governmental functions of the States of New York and New Jersey.

5. The Board erred in failing to hold that the functions exercised by the Port Authority during said years were primarily in connection with the furnishing of railroad, terminal and transportation facilities, and, hence, in the nature of private business.

6. The Board erred in holding that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of Governmental or sovereign func-

tions of the States of New York and New Jersey.

7. The Board erred in failing to hold that the building and operation of the several facilities of the Port Authority during the years in question constitute the exercise of the corporate or

proprietary functions of the two States.

8. The Board erred in holding that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constituted the exercise of the Governmental functions of the two States.

9. The Board erred in failing to hold that the construction and operation by the Port Authority of its several interstate bridges and tunnels for the transportation of passengers and packaged freight constitute public utilities, and, hence, were not the exercise of the Governmental functions of the two States.

10. The Board erred in holding that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 during the years in question for the housing of railroad terminals and the renting of loft and manufacturing space to the general public constituted the exercise of Governmental functions of the two States.

11. The Board erred in failing to hold that the construction and operation by the Port Authority of the Commerce Building and Inland Terminal No. 1 as aforesaid constitute a private or corporate undertaking, and, hence, were not the exercise 267

of the Governmental functions of the two States.

12. The Board erred in holding that the construction and operation of its several facilities by the Port Authority during the years in question were part of the sovereign functions of the two States in improving, protecting, and developing the Harbor of New York.

13. The Board erred in failing to hold that the construction and operation of said facilities by the Port Authority were not a part of the "traditional supervision exercised by government over seaports" and, hence, not an exercise of a Governmental function.

14. The Board erred in failing to make findings of fact as to numerous material facts stipulated by the parties and incorporated

in the Stipulations of Facts filed with the Board.

15. The Board erred in failing to make findings of fact as to numerous material facts of record, which facts are set forth in detail in the Commissioner's Motion for Amended and Specific Findings of Fact.

16. The Board erred in failing to grant the Commissioner's Motion

for Amended and Specific Findings of Fact.

17. The Board erred in failing to grant the Commissioner's 268 Motion for Reconsideration of the cases, based upon said Amended and Specific Findings of Fact.

18. The Board erred in failing to find for the Commissioner upon

all the facts of record.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

(Signed) ROBERT H.: JACKSON, Robert H. Jackson, Assistant Attorney General. (Signed) MORRISON SHAFROTH,

Morrison Shafroth,

. Chief Counsel, Bureau of Internal Revenue.

(Signed) George D. Brabson, George D. Brabson,

Special Attorney, Bureau of Internal Revenue.

GDB/MKP 1-15-37.

[Duly sworn to by George D. Brabson; jurat omitted in printing.] 51444-38270 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 80769

[Title omitted.]

Notice of filing petition for review

To: Mr. JOHN J. MULCAHY,

111 Eighth Avenue, New York, New York.

Mr. JULIUS HENRY COHEN,

111 Eighth Avenue, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 25th day of January 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 25th day of January 1937.

(Signed) Morrison Shafroth,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 27th day of Jan. 1937.

John J. Mulcahy,
Respondent on Review.
Julius Henry Cohen,
Attorney for Respondent on Review.

GDB/MEP 1-21-37.

272 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 77375

B. T. A. No. 77377

B. T. A. No. 80769

[Titles omitted.]

Stipulation to consolidate

Come now the parties to the above-entitled causes, and appearing by their respective counsel of record, stipulate and agree, subject to the approval of the court, as follows:

That for the purpose of briefing, hearing, argument and decision, the three causes appearing in the caption hereof are consolidated and may be heard upon a single printed record consisting of such docu-

ments as the parties may indicate by praecipe for record.

That because of its length, and to avoid unnecessary duplication, the statement of evidence heretofore filed herein shall be printed in the printed transcript of record but once and shall be taken and considered as and for a statement of evidence applicable to and referable to all the causes appearing in the caption hereof.

That, among other things, the record on review shall contain this

stipulation.

MORRISON SHAFROTH, (S.)Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review. (S.) JULIUS HENRY COHEN, Counsel for Respondents on Review.

In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 77375

Commissioner of Internal Revenue, petitioner on review

PHILIP L. GERHARDT, RESPONDENT ON REVIEW

B. T. A. No. 77377

COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

· BILLINGS WILSON, RESPONDENT ON REVIEW

B. T. A. No. 80769

COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

JOHN J. MULCAHY, RESPONDENT ON REVIEW

Statement of evidence

The following is a statement in narrative form of the evidence adduced in the above-entitled causes, including by reference the written stipulations of facts and exhibits thereto, together with a statement of the several stipulations and agreements of counsel for the parties entered into at the hearing before the United States Board of Tax Appeals.

These causes came on for hearing before the Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, on February 3 to 6, 1936. Julius Henry Cohen, Esq., Austin J. Tobin, Esq., and Wilbur LaRoe, Jr., Esq., appeared for the petitioners, and George D. Brabson, Esq., Francis H. Uriell, Esq., and John D. Kiley, Esq., appeared for the respondent.

By agreement of counsel for all parties the several causes were

consolidated for purposes of hearing and decision.

By agreement of counsel for all parties there was filed in evidence a printed document entitled "Stipulation of Facts" dated January 21, 1936, and consisting of 123 printed paragraphs with Exhibits A to S, inclusive, therein incorporated by reference, which Stipulation of Facts reads as follows (Exhibits A to S, inclusive, are not incorporated herein but are included as part of this statement of evidence as physical Exhibits):

Before United States Board of Tax Appeals 276

Docket No. 75816

Docket No. 77376

Docket No. 77375

[Titles omitted.]

Stipulation of facts

The parties hereto, by their undersigned counsel of record, hereby stipulate and agree that the following facts shall be taken as proved upon the filing of this stipulation, subject to their relevancy, com-

petency, and materiality and subject to the right of either party to introduce further evidence not inconsistent with the

terms of this stipulation.

1. The three petitioners above named are individuals and citizens of the United States. The petitioner Montgomery B. Case is a resident of Englewood, County of Bergen, in the State of New Jersey. The petitioner, Philip L. Gerhardt, is a resident of the County of Kings, City and State of New York. The petitioner, E. Morgan Barradale, is a resident of South Orange, County of Essex, in the State of New Jersey.

2. Each of the three petitioners above named is an employee of

The Port of New York Authority.

3. That The Port of New York Authority (hereinafter referred to as the Port Authority) was organized pursuant to a compact between the States of New York and New Jersey, dated April 30, 1921, pursuant to Chapter 154 of the Laws of New York, 1921, and Chapter 151 of the Laws of New Jersey, 1921, and confirmed by resolution of Congress of the United States, Public Resolution No. 17-67th Congress (S. J. Res. 88), and that the Port Authority was and is vested with the powers therein granted to it, and such other powers as are granted by Chapter 43 of the Laws of New York, 1922, and

Chapter 9 of the Laws of New Jersey, 1922, adopting a comprehensive plan for the development of the port of New York district, and such further powers as are granted by such other statutes of the States of New York and New Jersey as pertain to said The Port of

New York Authority.

278 4. That the Compact hereinbefore referred to was a Compact between the States of New York and New Jersey amending and supplementing the Compact of 1834 between the same two states.

- 5. That by reason of the fact that the Hudson and North Rivers, the Kill van Kull and the Arthur Kill, as well as other portions of the bay and harbor of New York, constitute and form the political boundary between the States of New York and New Jersey, it has been necessary that any action that has been taken by the two states for the development of the Port as a whole, be joint action by the two states.
- 6. That prior to and in the year 1916 the States of New York and New Jersey, whose northerly and southerly boundary lines lie within the Port of New York, found themselves faced with the problem of the Port's future development.

7. In 1911, President Wilson, then Governor of New Jersey, appointed a commission to study the problem of the development of the Port of New York in cooperation with a commission representing

the State of New York.

8. That following the report of that commission to the Legislature of New Jersey in 1914, there was created a New Jersey Harbor Commission.

9. That in 1915 that Commission was merged, together with several others, into the New Jersey Board of Commerce and Navigation.

279 10. That as a result of reports made by that Commission, the then Governor of New Jersey, Honorable James F. Fielder, appointed a Special Committee to discover ways and means for securing a readjustment of the freight rates to the Port District in favor

of the New Jersey side of the harbor.

11. That this committee, which was known as the "Committee on Ways and Means to Prosecute the Case of Alleged Railroad Rate and Service Discrimination at the Port of New York," instituted a proceeding before the Interstate Commerce Commission which was officially known as the New York Harbor Case, Docket No. 8994, 47 I. C. C. 643.

12. That the New York Harbor Case, which sought a revision of railroad freight rates in favor of New Jersey, aroused considerable opposition on the part of the State of New York, the City of

New York, and various civic and commercial organizations.

13. The decision of the Interstate Commerce Commission in the New York Harbor Case aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desirability of

unifying the port's transportation system, and such efforts as might be desirable upon the part of both states to effectuate the reorganization.

14. That in 1917 and upon the invitation of the New York State Chamber of Commerce, Governor Edge of New Jersey and Governor Whitman of New York were brought into con-

ference on the problems of Port Development.

15. That subsequently, in the year 1917, the Legislatures of the two States authorized their respective Governors to appoint members of the New York-New Jersey Port and Harbor Development Commission and appropriated \$450,000 for the work of the Commission.

16. That the said Commission was duly appointed by the Governors of the two states and directed, pursuant to the Act providing for its appointment, to make a comprehensive survey of port and harbor conditions, and if any conditions therein appeared to be in need of remedy or change, to recommend proper and adequate remedies and changes therefor. That said Commission undertook and thoroughly carried out said survey and made progress reports of conditions from time to itme, including the recommendations in 1918, of an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two states and proposed a tentative draft of such a Compact for consideration by the Governors and Legislatures of both States. A copy of the Preliminary Joint Report of the New York-New Jersey Port and Harbor Development Commission, containing said recommendations, which was transmitted to the Legislatures of both States on February 18, 1918, will be presented to the Board simultaneously with this stipulation and shall be deemed a part hereof, designated as Exhibit "A."

281 17. That the first public consideration of the tentative draft of a compact between the two states approved in said Joint Report was given at a meeting held at the New York Chamber of Commerce on December 19, 1918, at which were present Honorable Charles S. Whitman, the Governor of New York, Honorable Walter E. Edge, Governor of New Jersey, Honorable Charles E. Hughes,

Honorable Alfred E. Smith, and others.

18. That thereafter a bi-state legislative commission was appointed to cooperate with the New York-New Jersey Port and Harbor Development Commission in the revision of said tentative draft of the Compact and that sub-committees were formed consisting of the Attorneys General of both states, the majority and minority leaders of both Houses of both states and the Corporation Counsels of New York City and of Jersey City.

19. That thereafter and in 1919, said Joint Commission, having completed its survey, presented to and filed with the Legislatures of the two states and with the Governors thereof their "Joint Report with Comprehensive Plan and Recommendations." That a certain book entitled "Joint Report with Comprehensive Plan and Recom-

mendations—New York-New Jersey Port and Harbor Development Commission, and printed in Albany in the State of New York by J. B. Lyon Company, Printers, in 1920, is a true and accurate copy of the Joint Report with Comprehensive Plan and recommendations submitted by the said New York-New Jersey Port and Harbor

Development Commission to the Governor of the State of New York and the Governor of the State of New Jersey, and to the Legislatures of both States, under date of December 16, 1920. That a copy of said Joint Report with Comprehensive. Plan and Recommendations will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed to be a part hereof, designated as Exhibit B.

20. That the adoption of the Compact between the States of New York and New Jersey and the enactment of the Comprehensive Plan was preceded by the report to the Legislatures of both states of the New York-New Jersey Port and Harbor Development Commission, which was the same report referred to in the preceding paragraph.

21. The petitioners contend that the following documents, designated Exhibits C and D respectively, are material and competent and should be accepted as evidence in this case. Respondent denies that said exhibits are either material or competent. These exhibits will therefore be offered in evidence by the attorney for the petitioners subject to the respondent's express reservation and objection.

Exhibit C, a copy of which will be presented to the Board simultaneously with the presentation of this stipulation and, subject to the reservation and objection upon the part of the respondent noted above, shall be deemed a part hereof, consists of a special message to the

Legislature of the State of New York, sent by Governor Alfred E. Smith, on March 29, 1920, urging upon the Legislature the adoption of the Compact. It is set forth in a volume entitled "Public Papers of Governor Alfred E. Smith—1920" printed in Albany, in the State of New York, by J. B. Lyon Company, printers, in 1921, at pages 251-261, inclusive, thereof.

Exhibit D, a copy of which will be presented to the Board simultaneously with the presentation of this stipulation and, subject to the reservation and objection upon the part of the respondent noted above, shall be deemed a part hereof, consists of a special message to the Legislature of the State of New York, sent by Governor Nathan L. Miller during the year 1921, also urging upon the Legislature the adoption of the Compact. It is set forth in a volume entitled "Public Papers of Governor Miller—1921" printed in Albany, in the State of New York, by J. B. Lyon Company, printers, in 1924, at pages 83-86, inclusive, thereof.

22. That thereafter the Legislatures of the States of New York and New Jersey passed Acts authorizing certain designated persons, as Commissioners on the part of said States, to execute an agreement or compact between said States of New York and New Jersey in the form set forth in the said acts. The Act of the State of New York, being Chapter 154, Laws of New York, 1921, became a law

April 2, 1921, with the approval of the Governor and the Act of the State of New Jersey, being Chapter 151 of the Laws of New Jersey,

1921, became a law April 7, 1921, with the approval of the Governor of that State. That subsequently and in the month of August 1921 the Congress of the United States consented to

said Compact by Public Resolution No. 17—67th Congress; S. J.

Res. 88 (August 23, 1921).

23. That on April 30, 1921, the aforesaid Compact between the States of New York and New Jersey, establishing the Port District and creating The Port of New York Authority, was formerly signed by the Commissioners duly authorized so to do by the respective Legislatures in the Great Hall of the Chamber of Commerce of the State of New York. That a certain book entitled "Port Authority Statutes-Sixth Edition" issued by the Port Authority under date of January 1934, with Cumulative Supplement to June 1, 1935, contains, at pages 13 to 28, inclusive, of said book, a true and accurate copy of said Compact of April 30, 1921, and also contains, in other portions thereof, and in said Cumulative Supplement, true and accurate copies of the other compacts, statutes, and resolutions having to do with The Port of New York Authority, which are herein referred to. A copy of said "Port Authority Statutes-Sixth Editionand Cumulative Supplement to June 1, 1935", will be presented to the Board simultaneously herewith and shall be deemed to be a part hereof designated as Exhibit E.

24. That by Chapter 152 of the Laws of New Jersey, 1921, J. Spencer Smith, Frank R. Ford, and DeWitt Van Buskirk were selected and appointed as Commissioners to "The Port of New York Authors, New York Authors, New York Authors, New York New York, New York,

thority." That by Chapter 203 of the Laws of New York, 1921, the Governor of the State of New York was authorized

by and with the consent of the Senate to appoint three Commissioners to the aforesaid Port Authority, and that Nathan L. Miller, the then Governor of the State of New York, did, pursuant to such legislation, and with the consent of the Senate, appoint Eugenius H. Outerbridge, Alfred E. Smith, and Lewis H. Pounds as Commissioners thereof. That having taken the oath of office the aforesaid Commissioners met for organization on April 25, 1921, all of the Commissioners being present, and organized The Port of New York Authority by electing officers and appointing members of the staff.

25. That the said Compact of 1921 created a district to be known as the "Port of New York District" having specified geographical boundaries set forth in said Compact, and gave to The Port of New York Authority certain powers and jurisdiction therein in said Compact more particularly set forth.

26. That pursuant to the terms and provisions of the Compact, the aforesaid Port Authority investigated conditions within the port district and made findings and recommendations with respect thereto.

That pursuant to Chapter 203 of the Laws of New York, 1921, and Chapter 152 of the Laws of New Jersey, 1921, the Port Authority on or about the 21st day of December 1921 presented to the Governor of the State of New York and to the Governor of the State of New Jersey its report and recommendations together with a plan

for the comprehensive development of the Port of New York.

That a true and accurate copy of said "Report with Plan for
the Comprehensive Development of the Port of New York"

published in Albany, in the State of New York, by J. B. Lyon
Company, printers, in the year 1921, will be presented to the Board
simultaneously herewith and shall be deemed to be a part hereof,

designated as, Exhibit F.

27. That pursuant to Article X of the aforesaid Compact of April 30, 1921, and in accordance with the findings of recommendations of the New York-New Jersey Port and Harbor Development Commission embodied in its Joint Report with Recommendations hereinbefore referred to, and of The Port of New York Authority embodied in its Report with Plan for the Comprehensive Development of the Port of New York, dated December 21, 1921, the two States of New York and New Jersey adopted by joint legislation a Comprehensive Plan for the development of the Port of New York District and mutually agreed to carry out said plan and entrusted the effectuation thereof to The Port of New York Authority. That said comprehensive plan is embodied in Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922, approved by the Congress of the United States (Public Resolution No. 66-67th Congress-H. J. Res. 337), and the full text thereof is accurately set forth in the book entitled "Port Authority Statutes-Sixth Edition," pages 33 to 44, inclusive, a copy of which, following its presentation, in accordance with Paragraph 23 hereof,

has heretofore been designated Exhibit E in this stipulation.

28. That said comprehensive plan for the development of the Port of New York District provides in part as follows:

"Section 8. The port of New York Authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state to effectuate the same, except the power to levy taxes or assessments * * *. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effecting the pledge of the states in said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state or upon any municipality, except as and when such power is expressly given by statute, or the consent of any such muncipality is given."

29. That the joint resolution giving consent of Congress to the said

comprehensive plan (Public Resolution No. 66-67th Congress), pro-

vides in part as follows:

"And the consent of Congress is hereby given to the carrying out and effectuation of said comprehensive plan and the said Port of New York Authority is authorized and empowered to carry out and effectuate the same";

30. That on August 7, 1923, the Governors of the State of New York and of the State of New Jersey delivered to the Port Authority a joint statement outlining their views as to construction of additional vehicular tunnels or bridges between the States of New York and New Jersey, and requested the Port Authority to investigate the matter and make a report to said Governors with suggested legislation, if any were necessary, in time to be submitted to the respective legislatures early in their sessions of 1924. That said joint statement in part read as follows:

"One of the results of the conference between the two Governors was that we favor the construction at the earliest possible moment of additional vehicular tunnels or bridges between the State of New York and the State of New Jersey to be determined upon, constructed, and financed by the Port Authority and we stand ready to recommend to the Legislatures the passage of any additional legislation that

will be helpful toward the accomplishment of this result."

31. Following the receipt of the aforesaid communication from the Governors of the two states, the Port Authority proceeded to make preliminary studies of traffic conditions, present building costs, and other material questions relating to transportation between the

New York and New Jersey shores of the Hudson River, the Arthur Kill and the Kill van Kull insofar as they might bear upon the question of the construction of tunnels or bridges and

the most desirable locations therefor.

32. That on December 5, 1923, after due notice had been given in the public press and by direct communication to the municipalities, trade bodies, and transportation interests within the Port District, a public hearing on the subject of additional vehicular tunnels or bridges between the State of New York and the State of New Jersey was held, which meeting was attended by eighty persons representing forty-eight separate organizations, of which forty pre-

sented written or oral statements relating to the subject.

33. That on December 21, 1923, the Commissioners of the Port Authority rendered to the Governor of the State of New York and to the Governor of the State of New Jersey a "Report on Vehicular Tunnels and Bridges" which set forth the studies and hearings upon the subject of additional vehicular tunnels or bridges between the States of New York and New Jersey, and recommended, among other things, that preliminary engineering and traffic studies of plans for a bridge north of 125th Street, between the Borough of Manhattan and the State of New Jersey, and for at least two additional vehicular tunnels between New York and New Jersey should

be promptly undertaken. That a true copy of said report is set forth in a volume entitled "Port of New York Authority Annual

Report," dated January 19, 1924, published by J. B. Lyon 290 Company, Printers, Albany, N. Y., 1924, at pages 43 to 49, inclusive, thereof. A complete series of the Annual Reports of the Port Authority for the calendar years 1921 through 1934, inclusive, will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed a part hereof,

and collectively designated as "Exhibit G."

34. That on January 19, 1924, The Port of New York Authority submitted to the Governor of the State of New York and to the Governor of the State of New Jersey its Report for the calendar year 1923 which contained at pages 21 to 24, inclusive, thereof a summary of further findings and studies with respect to the necessity of constructing additional vehicular crossings between the States

of New York and New Jersey.

35. That by joint legislation embodied in Chapter 125 of the Laws of New Jersey, 1924, and Chapter 230 of the Laws of New York, 1924, the States of New York and New Jersey authorized The Port of New York Authority, in partial effectuation of the comprehensive plan for the development of the Port of New York, to construct, operate, maintain, and own a bridge with the necessary approaches thereto across the Arthur Kill between Perth Amboy on the New Jersey side and Tottenville on the New York side.

36. That by joint legislation embodied in Chapter 149 of the Laws of New Jersey, 1924, and Chapter 186 of the Laws of New York,

1924, the States of New York and New Jersey authorized
291 The Port of New York Authority, in partial effectuation of
the comprehensive plan for the development of the Port of
New York to construct, operate, maintain and own a bridge with
the necessary approaches thereto across the Arthur Kill between
Elizabeth on the New Jersey side and Howland Hook on the New
York side.

37. That during the calendar year 1924 the Port Authority, with the aid of appropriations by the two states aggregating \$200,000 appropriated therefor, made borings, surveys, and engineering studies as to the character and location of said bridges, thoroughly canvassed local sentiment, attended meetings of local interests and meetings with committees appointed by the Mayors of the three municipalities concerned, made counts of the vehicular traffic crossing all the ferries on the Arthur Kill and Kill van Kull, investigated the records of the ferry companies and made other studies with reference to the necessity and desirability of constructing the aforesaid bridges across the Arthur Kill.

That in its annual report for the calendar year 1924 to the Governor of the State of New York and the Governor of the State of New Jersey, dated January 24, 1925, the Port Authority presented to the two states a resumé of its work in connection with said bridges, set forth on pages 42 to 43 inclusive of said report.

38. That during the calendar year 1925, the Port Authority continued its studies with respect to the two bridges across the Arthur

Kill, and obtained the approval of the War Department of

292 the Federal Government to construction of said bridges.

39. That during the year 1926, the Port Authority, in accordance with the directions of the two State Legislatures, as aforesaid, commenced construction of the two bridges across the Arthur Kill, one between Perth Amboy in the State of New Jersey, and Tottenville in the State of New York, which bridge was named the Outerbridge Crossing, and the other between Elizabeth in the State of New Jersey and that section of Staten Island in the State of New York, known as Howland Hook, which bridge was named the Goethals Bridge. That such construction work was pursued until the said bridges were opened for traffic on June 29, 1928, having been completed at a cost in excess of \$17,000,000. That this cost was financed by the advance to the Port Authority of \$4,000,000 by the two states, and through the sale of bonds of the Port Authority, which bonds are known as "New York-New Jersey Interstate Bridge Bonds—Series A," in the amount of \$14,000,000.

40. That the Port Authority has since continued to own, maintain, and operate, and is at present maintaining and operating and does own the aforesaid bridges over the Arthur Kill, in partial effectuation of the Comprehensive Plan. That in its operation of these bridges the Port Authority may and has charged tolls to defray the maintenance, operation, and general expenses of these bridges, interest charges and to repay the aforesaid "New York-New Jersey Interstate"

Bridge Bonds - Series A," the advances made by the two states, debt service on General and Refunding Bonds (which, how-

ever, under existing statutes cannot be issued for any new facilities except two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its general reserve fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 on these two bridges was in excess of \$400,000, being paid by traffic in excess of 800,000 vehicles.

'41. That for the years 1928, 1930, and 1931, the operation of these

bridges resulted in annual surpluses, as follows:

	\$272, 676, 75
1928	76, 683, 54
1930	
1931	40, 673. 37
1931	

That for the years 1929, 1932, 1933, and 1934, the operation of these bridges resulted in annual net deficits, as follows:

	\$23. 3	40. ZI	
1929		272. 17	
1932			
		534. 46	
 1933	298, 8	351. 29)
1934	200,		

The surplus noted for the year 1928 resulted from the fact that interest on the funded debt of the two bridges for that year was charged to the investment account, for the reason that although the

two bridges had been opened to traffic on June 29, 1928, as aforesaid, the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1928.

294 42. That in the operation of these bridges and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter 113,

Laws of New Jersey, 1932.

43. That by joint legislation embodied in Chapter 41 of the Laws of New Jersey, 1925, and Chapter 211 of the Laws of New York, 1925, the States of New York and New Jersey authorized and empowered The Port of New York Authority, in partial effectuation of the Comprehensive Plan for the development of the Port of New York, to construct, operate, maintain, and own a bridge with the necessary approaches thereto across the Hudson River from points between 170th Street and 185th Street, Borough of Manhattan, and points approximately opposite thereto in the Borough of Fort Lee. Bergen County, New Jersey, and appropriated the sum of \$200,000-\$100,000 by each State-for the making of preliminary studies with reference to said bridge.

. 44. That during the calendar year 1925, the Port Authority undertook studies for the bridge across the Hudson River from Fort Lee to Manhattan of the same character undertaken with respect to the Arthur Kill Bridges, and the said studies are reported upon in the annual report of The Port of New York Authority to the Governors of the States of New York and New Jersey for the calendar year

1925, dated January 15, 1926, at pages 13 to 19 inclusive thereof. 45. That during the calendar year 1926, the Port Authority continued its studies with reference to the character and location of the Hudson River Bridge between Washington Heights in the Borough of Manhattan, City of New York, and the Borough of Fort Lee, New Jersey. That such studies were fully reported upon by the Port Authority to the Governor and Legislature of the State of New York and to the Governor and Legislature of the State of New Jersey in the annual report of The Port of New York Authority for the calendar year 1926, dated January 20, 1927, at pages 47 to 69, inclusive, thereof.

46. That during the year 1927 the Port Authority, in accordance with the directions of the two State Legislatures, as aforesaid, commenced construction of the said bridge over the Hudson River between Fort Lee in the State of New Jersey and the Borough of Manhattan in the City and State of New York, which bridge is known as the George Washington Bridge. That such work was pursued until the said bridge was opened for traffic on October 25, 1931, having been completed at a cost in excess of \$57,000,000. That this cost was financed by the advance to the Port Authority of \$9,800,000 by the two states, and through the sale of bonds of the

Port Authority, which bonds are known as "New York-New Jersey Interstate Bridge Bonds, Series B," in the amount of \$50,000,000.

47. That the said George Washington Bridge is the largest sus-

pension bridge in the world open today to traffic.

48. That the Port Authority has since continued to own. 296 maintain, and operate, and is at present maintaining and operating and does own the aforesaid George Washington Bridge over the Hudson River, in partial effectuation of the Comprehensive Plan. That in its operation of this bridge the Port Authority may charge and is charging tolls to defray the maintenance, operation. and general expenses of this bridge, interest charges, and to repay the bonds sold for its construction, the advances by the two States, debt service on General and Refunding bonds (which, however, under existing statutes cannot be issued for any new facilities except two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its General Reserve Fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 was in excess of \$3,300,000, being paid by traffic in excess of 6,150,000 vehicles.

49. That for the years 1931 to 1934, inclusive, the operation of the George Washington Bridge resulted in a net income from operations,

prior to deductions for amortization, as follows:

1931	\$504, 264. 08
1932	1, 473, 363. 61
1933	1, 142, 770. 42
1934	1, 356, 476. 67

50. That in the operation of this bridge and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter

113, Laws of New Jersey, 1932.

51. That by joint legislation embodied in Chapter 97 of the Laws of New Jersey 1925, and Chapter 279 of the Laws of New York 1926, The Port of New York Authority was authorized and empowered, in partial effectuation of the Comprehensive Plan for the development of the Port of New York, to construct, operate, maintain, and own a bridge with the necessary approaches thereto across the Kill van Kull from Bayonne on the New Jersey side to Staten Island on the New York side.

52. That during the calendar year 1926, the Port Authority continued its studies with reference to the character and location of such a bridge across the Kill van Kull between Bayonne in the State of New Jersey, and Port Richmond, Staten Island, in the State of New York. That such studies were fully reported upon by the Port Authority to the Governor and Legislature of the State of New York in the annual report of The Port of New York Authority for the calendar year 1926, dated January 20, 1927, at page 67 thereof.

53. That during the year 1928, the Port Authority, in accordance with the authorization of the two State Legislatures, as aforesaid, commenced construction of the said bridge over the Kill van Kull between the City of Bayenne on the New Jersey side and Port

Richmond, Staten Island, on the New York side, which bridge
was named the Bayonne Bridge. That such work was pursued
until the Bayonne Bridge was opened for traffic on November
15, 1931, having been completed at a cost in excess of \$13,000,000.
That this bridge was financed by the advance to the Port Authority
of \$4,100,000 by the two states, and through the sale of bonds of
the Port Authority, which bonds are known as "New York-New
Jerry Interstate Bridge Bonds, Series C," in the amount of
\$12,000,000.

54. That the Port Authority has since continued to own, maintain, and operate, and is at present maintaining and operating and does own the aforesaid Bayonne Bridge over the Kill van Kull, in partial effectuation of the Comprehensive Plan. That in its operation of this bridge the Port Authority may charge and is charging tolls to defray the maintenance, operation, and general expenses of this bridge, interest charges, and to repay the bonds sold for its construction, the advances by the two States, debt service on General and Refunding Bonds (which, however, under existing statutes cannot be issued for any new facilities except the two inland terminals in Manhattan and two marine terminals in New Jersey) and, through its General Reserve Fund, debt service on its other now outstanding bonds. That the total of the tolls paid during the year 1934 was in excess of \$210,000, being paid by traffic in excess of 450,000 vehicles.

55. That for the year 1931, the operation of the Bayonne Bridge resulted in an annual surplus of \$25,400.29.

That for the years 1932 to 1934, inclusive, the operation of the Bayonne Bridge resulted in annual net deficits, as follows:

1932	\$101, 466. 11
1934	240, 890. 18
AVVI	163, 848, 67

The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason that although the bridge was opened for traffic on November 15, 1931, as aforesaid, the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1931.

56. That in the operation of this bridge and direction of traffic thereon, the Port Authority maintains its own uniform police force consisting of men appointed by the Port Authority and who are designated as regular peace and police officers of both states by Chapter 388, Laws of New York, 1928, and Chapter 113, Laws of New Jersey, 1932.

57. That prior to, and independently of their consideration of a Comprehensive Plan for the development of the Port of New York,

the States of New York and New Jersey had for many years, back at least as far as 1906, examined and investigated the necessity for, and practicability of, construction of one or more vehicular bridges or tunnels across the North or Hudson River between the Borough of Manhattan, City of New York, and the neighboring metropolitan areas on the westerly side of the River in the State of New

Jersey!

58. That by Chapter 260 of the Laws of New York, 1906, there was created "The New York Interstate Bridge Commission," consisting of three members appointed by the Governor, for the purpose of conferring, on behalf of the Governor and Legislature of the State of New York, with the Governor and Legislature of the State of New Jersey for the purpose of considering the feasibility and practicability of constructing one or more bridges over the Hudson River from the City of New York to the State of New Jersey at the joint expense of both States.

59. That by Chapter 319 of the Laws of New York, 1907, the number of Commissioners of the New York Interstate Bridge Commission was increased to five, one of the additional members to be appointed by the Mayor of the City of New York and the other to be the incumbent of the office of Commissioner of Bridges of the said City. From time to time thereafter additional legislation was enacted continuing the Commission, making appropriations for its needs and extending its powers. By Chapter 189 of the Laws of New York, 1913, the Commission was authorized to consider the possibilities of vehicular tunnel construction and its name changed to "The New York State Bridge and Tunnel Commission."

60. That throughout its existence the New York State Bridge and Tunnel Commission conferred and cooperated with New Jersey Commissions and other agencies, both official and unofficial in character, and rendered reports to the Governor and Legislature of the

State.

301 61. Private individuals and organizations both in the States of New York and New Jersey investigated and made reports

on the need of such a tunnel.

62. That by Chapters 49 and 50 of the Laws of New Jersey, 1918, the Governor and Legislature of that State created The New Jersey Interstate Bridge and Tunnel Commission and authorized the construction of a bridge or tunnel or tunnels across the Hudson and Delaware Rivers at the direct expense (so far as New Jersey's share of the cost was involved) of the State.

63. That the New Jersey State Legislature of 1919, by Chapter 70 of the Laws of New Jersey, 1919, provided funds in the amount of one million dollars for the construction of a tunnel or tunnels under the Hudson River and five hundred thousand dollars for construction of a bridge across the Delaware River and ten thousand dollars for expenses incidental to the work and enabled The New Jersey Interstate Bridge and Tunnel Commission to take up with renewed vigor the final preliminary work prior to construction of

the interstate bridges and tunnels which the Legislature directed the Commission to construct. That the Legislature of the State of New York took similar action immediately in the same year and provided as its share of funds for the construction of a tunnel or tunnels by appropriating for the use of The New York Interstate Bridge and Tunnel Commission the sum of one million dollars.

64. That on or about the 30th day of December 1919, pursuant to the authorization of the Legislatures and Governors of both States, the State of New York, acting by and through The New York Interstate Bridge and Tunnel Commission, and the State of New Jersey, acting by and through The New Jersey Interstate Bridge and Tunnel Commission, entered into an agreement for construction of an interstate vehicular tunnel under the Hudson River between the City of New York and the City of Jersey City, under which said tunnel was to be constructed and operated jointly by the Commissioners as direct agents and representatives of the two States. That prior to the signing of said agreement the Congress of the United States consented thereto by Public Resolution No. 10-66th Congress (S. 409). That copies of said Compact of December 30, 1919, together with copies of the Legislation of both the States of New York and New Jersey, authorizing said Compact and of Public Resolution No. 10-66th Congress (S. 409) are contained in a volume entitled "Port Authority Statutes (Supplement)" revised to July 1931, published by The Port of New York Authority as of July 1, 1931, as a supplement to the Fifth Edition of the Port Authority Statutes, a copy of which will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed part hereof, designated as Exhibit H.

65. That in the year 1920 The New Jersey Interstate Bridge and Tunnel Commission and The New York Interstate Bridge and Tunnel Commission submitted to the Legislatures of their respective states a complete report of their studies and activities during the year 1919 as to the nature and location of the proposed

vehicular tunnel. That copies of the said reports to the Legislatures of the States of New York and New Jersey will be submitted to the Board simultaneously with the presentation of this stipulation and shall be deemed a part hereof and designated as Exhibits I and J.

66. That said tunnel was constructed by said Commission and is now known as the Holland Tunnel. That the share of the cost of the construction of said tunnel to be borne by the State of New York was met by direct appropriations of the State. That New Jersey's share of the cost of construction of said tunnel was defrayed by the proceeds of a bond issue covering the cost of construction, both of said tunnel and of the Delaware River Bridge, which bond issue was authorized by the Governor and the Legislature of the State of New Jersey following its approval by a referendum vote of the people of that state.

67. That following the construction of said Holland Tunnel and its operation over a period of years by the aforesaid New York. Interstate Bridge and Tunnel Commission and the aforesaid New Jersey Interstate Bridge and Tunnel Commission, acting as a joint Commission on behalf of both States, it was determined by the States of New York and New Jersey, acting through the Governors and Legislatures thereof, that the operation of said tunnel facility should be conducted and continued as part of the operations of The Port

of New York Authority in carrying out the Comprehensive 304 Plan for the development of the Port of New York. Accordingly, by Chapter 247 of the Laws of New Jersey, 1930,

and by Chapter 421 of the Laws of New York, 1930, and the New York-New Jersey Interstate Bridge and Tunnel Commission was merged with The Port of New York Authority, and the Port Authority was vested by the two States of New York and New Jersey with the control, operation, and maintenance of the Holland Tunnel.

68. That by the joint legislation of the two states, embodied in Chapter 4 of the Laws of New Jersey, 1931, and Chapter 47 of the Laws of New York, 1931, being Chapters bearing identical titles

as follows:

"An Act declaring the policy of the States of New York and New Jersey in regard to certain vehicular bridges and tunnels within the Port of New York District; and in furtherance of the said policy, vesting the control and operation of the Holland Tunnel in The Port of New York Authority and authorizing the Port Authority to construct an additional interstate vehicular tunnel, and regulating the construction and operation of bridges and tunnels by the Port Authority"

it is provided in part as follows:

"The States of New York and New Jersey hereby declare and agree that the vehicular traffic moving across the interstate waters—within the port of New York district, created by the Compact

of April thirty, nineteen hundred twenty-one, between the said states, which said phrase 'interstate waters' as used in this act shall include the portion of the Hudson River within the said port of New York district north of the New Jersey state line, constitutes a general movement of traffic which follows the most accessible and practicable routes, and that the users of each bridge or tunnel over or under the said waters benefit by the existence of every other bridge or tunnel since all such bridges and tunnels as a group facilitate the movement of such traffic and relieve congestion at each of the several bridges and tunnels. Accordingly the two said states, in the interest of the users of such bridges and tunnels and the general public, hereby agree that the construction, maintenance, operation, and control of all such bridges and tunnels, heretofore or here after authorized by the two said states, shall be unified under the port of New York authority (hereinafter called the port authority), to the end that the tolls and other revenues therefrom shall be applied so far as practicable to the costs of the construction, maintenance,

and operation of said bridges and tunnels as a group and economies in operation affected, it being the policy of the two said states that such bridges and tunnels shall as a group be in all respects self-sustaining."

69. It is further provided in said joint legislation of the States of

New York and New Jersey as follows:

effectuation of the comprehensive plan heretofore adopted by the two said states for the development of the said port of New York district, the control, operation, tolls, and other revenues of the vehicular tunnel, known as the Holland Tunnel, under the Hudson River between the city of Jersey City and the City of New York, shall be rested in the port authority as hereinafter provided; and the port authority is hereby authorized and empowered to construct, own, maintain, and operate an interstate vehicular tunnel or tunnels (hereinafter called the Midtown Hudson Tunnel) under the Hudson River, together with such approaches thereto and connections and highways as the port authority may deem necessary or desirable.

"The port authority shall from time to time make studies, survey, and investigations to determine the necessity and practicability of additional vehicular bridges and tunnels over or under interstate waters within the said port of New York district, and report to the governors and legislatures of the two states thereon. The port authority shall not proceed with the construction of any additional vehicular bridges and tunnels over or under said interstate waters

until hereafter expressly authorized by the two said states."

70. That prior to 1931, the States of New York and New Jersey had by joint legislation embodied in Chapter 420, Laws of New York,

1930, and Chapter 248, Laws of New Jersey, 1930, authorized and empowered the Port Authority to study and report upon such a vehicular tunnel under the Hudson River between a point in the vicinity of 38th Street in the Borough of Manhattan, City and State of New York and a point opposite thereto in the State of New Jersey. That the two states, in the same legislation, had appropriated the sum of \$400,000, \$200,000 being appropriated by each state, for defraying the expenses of such preliminary studies.

71. That during the calendar year 1930, the Port Authority undertook studies covering all phases of the preliminary investigation of such a tunnel under the Hudson River between West 38th Street in Manhattan and the Township of Weehawken, in New Jersey, and submitted a report on the results of these investigations to the Governors and Legislatures of the two States. The principal conclusions of these reports may be found in the annual report of The Port of New York Authority to the Governors of the States of New York and New Jersey covering the calendar year 1930 and dated February 20, 1931, at pages 40 and 41 thereof.

72. That by the aforementioned and quoted legislation, embodied in Chapter 4 of the Laws of New Jersey, 1931, and Chapter 47 of the Laws of New York, 1931, the two states authorized and empowered

the Port Authority, in partial effectuation of the Comprehensive Plan for the development of the Port of New York, to construct. own, maintain, and operate the Midtown Hudson Tunnel under the

Hudson River, together with the necessary approaches thereto. 73. That during the calendar years 1931, 1932, and 1933, 308 the Port Authority continued its studies, plans, and preparations with reference to the Midtown Hudson Tunnel. That such studies and conclusions were fully reported upon by the Port Authority to the Governors of the two states in the annual reports of The Port of New York Authority for the calendar years 1931, 1932, and 1933 (Annual Report for the year 1931, dated February 18, 1932, at pages 39 and 40; Annual Report for the year 1932, dated March 1, 1933, at pages 37 to 39 inclusive; Annual Report for the year 1933, dated March 5, 1934, at pages 42 to 44, inclusive).

74. That during the year 1934, the Port Authority, in accordance with the aforesaid directions of the two states, commenced construction of the Midtown Hudson Tunnel. That the Port Authority is now engaged in the construction of said tunnel and that it is planned that the work of construction will be completed and that the tunnel

will be opened for traffic during the year 1938.

75. That the estimated cost of the first operating unit of the Midtown Hudson Tunnel, which consists of the southerly tube, is in excess of \$37,500,000 and that this cost was being financed by a loan to the Port Authority by the United States of America, as is more fully recited hereinafter in this stipulation.

76. The projects of the Port Authority have been financed in part by outright appropriations of the States of New York 309 and New Jersey; in part by direct advances of the States of New York and New Jersey, as against which the revenues of the projects are to be paid over to the states at the times and in the amounts specified in the statutes applicable thereto; and in part by bond issues of The Port of New York Authority.

As of November 30, 1935 (adjusted to give effect to the sale on December 11, 1935 of \$16,500,000 General and Refunding Bonds, and to give effect to the cancellation on December 20, 1935 of \$14,800,000 of Midtown Hudson Tunnel Notes), the Port Authority's funded

debt was as follows: New York-New Jersey Interstate Bridge Bonds, Series A (Arthur Kill Bridge Construction). Outstanding-\$12,200,000; of which

the Port Authority has acquired and pledged \$5,643,000;

New York-New Jersey Interstate Bridge Bonds, Series B 48 B 41/2's (George Washington Bridge Construction). Outstanding-\$48,420,000; acquired by the Port Authority and pledged \$1,580,000;

New York-New Jersey Interstate Bridge Bonds, Series C (Bayonne Bridge Construction). Outstanding-\$8,861,000; acquired by the

Port Authority and pledged \$3,139,000;

New York-New Jersey Terminal Bonds, Series D (Inland Terminal Construction). Outstanding-\$14,820,000; acquired by the Port Authority and pledged \$1,180,000;

New York-New Jersey Interstate Tunnel Bonds, Series E (Holland Tunnel). Outstanding—\$46,008,000; acquired by the Port Authority and pledged \$992,000;

General and Refunding Bonds, First Series 4%, Due 1975 (Refunding and Midtown Hudson Tunnel Construction). Outstanding—

\$45,331,000;

General and Refunding Bonds, Second Series, 33/4%, Due 1965 (Midtown Hudson Tunnel Construction). Outstanding (as of December 11, 1935) \$16,500,000;

Series F Bonds (George Washington Bridge). Outstanding-

\$2,500,000.

Prior to 1931, the Port Authority had issued its A, B, and C Bonds for bridge construction. Each issue is secured by a first lien upon revenues of the particular project, but in each case the lien is suspended as to current revenues when an amount equal to 20% of the issue is accumulated in sinking or special reserve funds, over and above current interest and maturities. The two States have advanced moneys in aid of the bridges as follows: Arthur Kill Bridges: Construction—\$4,000,000, Preliminary Studies—\$200,000; Bayonne Bridge: Construction—\$4,000,000, Preliminary Studies—\$100,000; George Washington Bridge: Construction—\$9,500,000, Preliminary Studies—\$300,000. Except for New Jersey's advance (\$4,500,000) in aid of the George Washington Bridge which was recently liquidated by the issue of Series F Bonds, the Bridge Financing Acts (see Port Authority Statute Book, Exhibit E, pp. 100, 130, 147, 168,

177, 187) require the repayment of the foregoing advances out of bridge revenues, in the amounts and at dates specified in the statutes, but this requirement is subject to the prior liens of the

bridge bonds.

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In 1931, the two states agreed that bridges and tunnels crossing interstate waters, in the Port District, should be unified under the Port Authority (Chapter 47, Laws of New York, 1931; Chapter 4, Laws of New Jersey, 1931), and further agreed that surplus revenues from various Port Authority projects should be pooled in a General Reserve Fund to support various Port Authority securities (Chapter 8, Laws of New York, 1931; Chapter 5, Laws of New Jersey, 1931). At the same time, the States vested the Port Authority with the control and operation of the Holland Tunnel.

The bonds of the Port Authority have been issued or contracted to be issued to the general public, as exempt from Federal and State taxation, based upon the opinion of Counsel that they were so exempt. Respondent denies that the bonds of the Port Authority are exempt

from Federal taxation.

The same year, the Port Authority issued its Series D and E Bonds (secured respectively by the revenues of the Holland Tunnel and Port Authority Inland Terminal No. 1), and pledged its General Reserve Fund as security for all of its outstanding issues, including the prior bridge issues.

In 1933, the Port Authority entered into an agreement with the United States (acting through the Federal Emergency Administra-

tion of Public Works) for the financing of the first operating unit of the Midtown Hudson Tunnel. Pursuant to this agree-312 ment, \$2,500,000 of Midtown Hudson Tunnel Notes were issued to refund prior bank loans for tunnel purposes, and the Government purchased installments of Midtown Hudson Tunnel Notes ag-

gregating \$12,300,000.

In 1935, the Port Authority adopted a program for the refunding of its then outstanding obligations aggregating \$152,000,000 (Series A to E, inclusive, and Midtown Hudson Tunnel Notes) through the medium of its General and Refunding Bonds, which are supported by a pledge of its General Reserve Fund and (subject to prior liens and to the repayment of State advances) by a pledge of revenues of projects now in operation or under construction. In addition, all bonds acquired pursuant to the refunding program with the proceeds of General and Refunding Bonds are pledged as collateral security for General and Refunding Bonds. Each issue of bonds so pledged is to be fully retired and cancelled when the entire issue has been acquired, except that no bridge issue is to be fully retired and cancelled until the advances made by the State for the particular project have been liquidated or amortized.

Pursuant to its refunding program, the Port Authority has refunded the bonds shown above as acquired for retirement. It has also refunded and fully retired and cancelled the entire issue of Midtown Hudson Tunnel Notes. Negotiations are now being carried on with the Federal Emergency Administration of Public Works

looking to the cancellation of the existing Loan Agreement, and the making of an outright grant in aid of the construction 313of the Midtown Hudson Tunnel not to exceed \$4,780,000.

The distribution of Port Authority revenues as of November 1, 1935 (prior to the sale of \$16,500,000 of General and Refunding Bonds on December 11, 1935, and prior to the cancellation of the Midtown Hudson Tunnel Notes issue), is shown upon Exhibit K.

The foregoing agreement with the Government for the financing of the first operating unit of the Midtown Hudson Tunnel contained a provision that the Government should be furnished with opinions of the Port Authority's General Counsel and of its Bond Counsel to the effect that the Midtown Hudson Tunnel Notes were "exempt, under the Constitution of the United States as now in force, from any and all taxation (except estate, inheritance, and gift taxes) now or hereafter imposed by the United States of America or by the States of New York or New Jersey," and that the Government should be under no obligation to purchase any of the Notes unless it was satisfied on that point.

Such opinions were furnished and the aforesaid Midtown Hudson Tunnel Notes were accepted by the Government. A true copy of said Loan Agreement of September 1, 1933, between the United States of America and The Port of New York Authority, together

also with the Supplemental Loan Agreement of March 18, 1935, will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed a part hereof designated as Exhibit L.

Respondent objects to the inclusion of the foregoing two
paragraphs as a part of this stipulation as incompetent and
irrelevant to the issues, and to the introduction of Exhibit L

in evidence upon the same ground.

Specimen copies of bonds in all of the foregoing issues have been bound in a pamphlet and will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed

s part hereof, designated as Exhibit M.

77. That by Chapter 96 of the Laws of New Jersey, 1934, claims between the State of New Jersey and the Port Authority were adjusted and liquidated by the payment of the sum of \$500,000 by the Port Authority to the State of New Jersey. These claims had to do with appropriations made by the State of New Jersey to the Port Authority in aid of the construction of the George Washington Bridge, of which a balance was due and unpaid by the State; and agreement between the Port Authority and the State Highway Commission by which the Port Authority was to bear the cost of certain highway construction work whenever traffic over the George Washington Bridge amounted to ten million (10,000,000) vehicles a year; and also certain moneys which were due and payable by the State of New Jersey to the Port Authority under the provisions of Article XV of the Compact.

Under the provisions of Chapter 293 of the Laws of New York, 1935, and Chapter 165 of the Laws of New Jersey, 1935, the two States authorized the adjustment of, and the State of New Jersey

adjusted and liquidated, claims arising in their favor by reason of advances made to the Port Authority in connection with the construction of the George Washington Bridge.

78. A true and accurate statement of the financial condition of the Port Authority is to be found in the Annual Reports issued by the Port Authority, all of which have been presented to the Board under

the provisions of Paragraph 33 of this stipulation.

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79. That the Port Authority has conducted extensive studies into the system of transportation, highway, and terminal facilities of the Port District and into methods of handling freight by the various nailways, ferry companies, and other transportation agencies, and over the highway systems of both States entering said District, and into methods of remedying street, highway, and waterway congestion in connection with the existing and contemplated transportation, highway, and terminal facilities, and in accordance with such studies, the Port Authority has sought means of improving such systems and nethods of freight handling and transportation facilities. The foregoing studies have been conducted in accordance with the provisions of the Compact of April 30, 1921, and of the Comprehensive Plan.

80. That the Commissioners of the Port Authority, in their annual reports, fully apprised the Legislatures and Governors of both the States of New York and New Jersey of the steps being taken, to remedy such conditions by means of an integrated and coordinated

system of Union Inland Freight Terminals at strategic points
in the Port District and that the Governors and Legislatures
of both states have assisted The Port of New York Authority
in its studies in connection with this problem by state appropriations
and by legislation which has empowered the Port Authority to construct such terminals on a self-liquidating basis as parts of the Com-

prehensive Plan.

81. The location and character of "Inland Terminal No. 1" was determined by the Port Authority after exhaustive research and studies and after a public hearing for the purpose of "adducing what facts, data, information, and opinions will be of aid in determining

location, system, and character" of such a terminal building.

82. That such public hearing was attended by representatives of municipalities, railroads, shippers, consignees, warehouse men, civic and trade associations, property owners, and others, and that the opinions of all persons interested in the location and character of such a terminal were canvassed and secured by the Port Authority prior to its determination as to the location and character of Inland Terminal No. 1. A copy of the Stenographic Report of said public hearing, held on October 1, 1929, in the offices of the Port Authority, will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed part hereof, designated as Exhibit N. 83. That the Commissioners of the Port Authority, in their annual

reports, fully apprised the Legislatures and Governors of both the States of New York and New Jersey of the character and

317 location of the Inland Terminal No. 1 prior to the construction

thereof by the Port Authority.

84. That the resolutions of the Port Authority authorizing and approving the construction of Inland Terminal No. 1, including the utilization of the upper floors thereof for office, loft, and manufacturing purposes, were approved and ratified by the Governors of the States of New York and New Jérsey. A copy of these resolutions, being resolutions of The Port of New York Authority adopted during the years 1926, 1927, 1929, 1930, 1931, and 1933, will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed a part hereof, designated as Exhibit O.

85. That the acts of the Port Authority in constructing the Inland Terminal No. 1, as it exists today, were approved and ratified by the Governors and Legislatures of the States of New York and

New Jersey.

86. That on or about the 31st day of December, 1930, the Port Authority entered into a written agreement with eight trunkline railroads entering the Port of New York District whereby the Port

Authority agreed to erect an Inland Terminal Building and to lease substantially all of the street and basement floors of said buildings to said trunkline railroads for a term of five (5) years, with the privilege and option on the part of the railroads to renew said lease for nine successive periods of five (5) years each, for use as an

Inland Terminal Station for the transportation, assemblage, and the distribution of less-than-carload freight for each rail-

A copy of said agreement between the Port Authority and said trunkline railroads, dated December 31, 1930, will be presented to the Board simultaneously with the presentation of this stipulation and shall be deemed a part hereof, designated as Exhibit P.

That the upper floors of said buildings are constructed in such i manner as to be suitable for rental and occupancy for purposes of manufacturing, office and other industrial business uses, and that the entire building is fifteen stories in height, covers one city block, and is 800 feet in length and 200 feet in width. It is commonly mown as the Port Authority Commerce Building, housing Inland Terminal No. 1.

The Port Authority has from time to time advertised the facilities of such building, as it has also advertised its bridges and tunnels, and there is attached hereto and shall be deemed a part hereof, a series of such building advertisements, and also of bridge and tunnel

idvertisements, designated as Exhibit Q.

87. That pursuant to said agreement of December 31, 1930, substantially all of the street and basement floors of said Inland Terminal Building are now actually leased to and in use by the aforesaid trunkline railroads as an Inland Terminal Station for the transportation, assemblage and the distribution of less-than-carload freight and that such Inland Terminal Station is commonly known as Inland Terminal No. 1.

88. That said Inland Terminal Station is not subdivided among

the carriers but is a union station.

319 89. All income, revenues, and receipts of the Port Authority are derived from the following sources: (a) toll charges from bridges and tunnels; (b) rentals of Inland Terminal No. 1 paid by the railroad carriers; (c) rentals received from the upper floors of Inland Terminal No. 1; (d) rentals from real estate purchased for, but not yet devoted to, uses in connection with the Comprehensive Plan; (e) interest from investments of funds in various sinking, reerve, and other funds, in securities; (f) revenue from operation of bus line over Goethals Bridge; (g) interest on bank balances; (h) niscellaneous income including such items as rental of telephone ducts, sales of gasoline, towing charges, tire changes, and interest on bank balances, etc.; (i) advances by the States made under the provisions of the Compact and Comprehensive Plan until such time as the Port Authority is self-sustaining. All bridges and tunnels owned and operated by the Port Authority required at all times up

to and including the present time, the payment of a toll charge by

vehicles using them.

90. During the year 1933, the Port Authority owned certain apartment houses and store buildings acquired in connection with the ultimate development of approaches to the George Washington Bridge and the new Midtown Hudson Tunnel, which buildings had not at that time been demolished for approach purposes and which were therefore under rental to the public as of December 31, 1933. These properties, acquired by the Port Authority during the years 1928 to

. 1935, inclusive, are the following:

134 Haven Avenue, 416 Ft. Washington Avenue, 700 West 179th Street, 701 West 178th Street, 703 West 178th Street, 706 West 179th Street, 709 West 178th Street, 710 West 179th Street, 714 West 179th Street, 618-20 West 179th Street, 1314-20 Riverside Terrace, 410 Ft. Washington Avenue, 426-28 West 37th Street, 427-9 West 38th Street, 431-33-35-37 West 38th Street, 430 West 39th Street, 431 West 39th Street, 438-40 West 39th Street, 428-30 West 40th Street, 429-31 West 40th Street, 422-26-28 West 41st Street, 429 West 41st Street, 504-6 Tenth Avenue, 514-16 Tenth Avenue, 425 West 34th Street, 429 West 34th Street, 423-25 West 35th Street, 429 West 35th Street, 433 West 35th Street, 428-30 West 36th Street, 424 West 37th Street, 447-53 West 38th Street, 427 West 40th Street, 435-3

West 40th Street, 552-54 West 40th Street (510-11 Avenue), 418-20 West 41st Street, 502 Tenth Avenue, Tenth Avenue between 39th & 40th Streets, 436. West 39th Street, 549-51 West 39th Street, 427 West 35th Street, 334-36 Park Avenue, Weehawken, N. J.

The total net loss derived from this source in 1933 was \$61,482.63; in 1932 the total net loss was \$47,356.91; and in 1931 there was a This is interim total net income from such rentals of \$36,115.61. management for the purpose of minimizing loss of capital investment prior to their utilization for bridge or tunnel purposes,

91. During the period from 1931 to 1933, inclusive, the Port Authority was the owner of miscellaneous securities as shown in a list which will be presented to the Board simultaneously with the presentation of this stipulation, and shall be deemed a part hereof,

designated as Exhibit R.

92. The Port Authority had investments in the capital stock of ten wholly owned subsidiary corporations, aggregating \$10,000, as of December 31, 1933. All of these corporations, except one, had been formed for the purpose of acquiring title to properties required for Port Authority projects through secret, private purchase, on behalf of, but without revealing the identity of, the Port Authority, and have been used for no other purpose except as hereinafter stated. The other subsidiary corporation, The Galric Com-

pany, Inc., was organized and has acted only as the interim managing agent on behalf of the Port Authority in connection with the operation of certain properties originally acquired for the George Washington Bridge Approach, but not yet utilized

Randum Realty Corporation, one of the other for that purpose. subsidiaries, performs similar functions as those performed by The Galric Company in connection with the interim management of the

properties acquired for the Midtown Hudson Tunnel.

93. The Port Authority has made efforts to increase the traffic through, and the use of, its bridges and tunnels by publishing and displaying advertisements of these facilities in magazines, trade journals, and in public places. The respondent will offer in evidence a copy of certain recommendations prepared by the staff of the Port Authority (which have been voluntarily furnished to the respondent by the petitioners, at respondent's request) entitled "Traffic Promotion Progress for 1933" and "Traffic Promotion Progress for 1934." The petitioners contest the materiality and the competency of the offers of these exhibits in evidence and wish to specifically record their objection to them. in this paragraph. exhibits are included herein as Exhibit S.

94. A few of the factors with respect to the relationship of the Port Authority with the two States of New York and New Jersey are in part set forth, under the Compact and Statutes of the two

States, as follows:

(a) The functions of the Port Authority are such as are conferred by the Compact and the Statutes of the two States and are exercised by twelve Commissioners, six resident voters each from the States of New York and New Jersey, who are chosen

as the Legislatures of each shall determine.

The Commissioners from the State of New York may be removed only upon charges and after a hearing by the Governor. The Commissioners from the State of New Jersey may be removed only upon charges and after a hearing by the Senate of the State of New Jersey. (Compact, Article IV; Chapter 422, Laws of New York,

1930; Chapter 245, Laws of New Jersey, 1930.)

(b) No action of the Commissioners is binding unless approved by a majority of the Commissioners from each State. The Governor of each State has a veto power over the acts of each Commissioner from his State and no action of any Commissioner has force or effect until a specified period after the minutes of each meeting have been transmitted to the Governor of his State. (Compact, Article IVI; Chapter 333, Laws of New Jersey, 1927; Chapter 700, Laws of New York, 1927.)

(c) Under the provisions of Chapter 222, Laws of New York, 1928, employees who transfer to Port Authority service from State service and who are already members of the State Retirement System may continue in that System after such transfer to Port Authority service. Under the provisions of Chapter 259, Laws of New York, 1935, all other employees of the Port Authority are permitted to join the

New York State Retirement System.

(d) The Commissioners of the Port Authority subscribe to oaths of office. The respondent denies that there is any statutory authority requiring the taking of such oaths by Commissioners of the Port Authority. The petitioner contends that the taking and filing of such oaths are required by law.

(e) Reports on all activities of the Port Authority are required to be and are submitted to the Legislatures and Governors of both States annually and at other times when requested.

(f) The Commissioners constitute a board for the purpose of doing business and may adopt suitable by-laws for its management.

(Compact, Article V.)

(g) All laws of both states vesting jurisdiction or control in the public service commission, public utilities commission, or other like body within each state apply to railroads and to any transportation, terminal, or other facilities owned, operated, leased, or constructed by the Port Authority with the same force and effect as if such railroad or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation. (Compact, Article VIII.)

(h) Until revenues from the operations of the Port Authority are adequate to meet all expenditures, the legislatures of the two states are obligated to appropriate, in equal amounts, annually, for the

salaries, office, and other administrative expenses, sums as recommended by the Port Authority and approved by the Gov-

ernors of the two states up to \$100,000 in any one year. The Port Authority is prohibited from incurring any such obligation for salaries, office, and other administrative expenses prior to the making of appropriations adequate to meet same by the two legis-(Compact, Article XV.) latures.

95. Under the Compact and statutes of the two states, the Port Authority, among others, is given the following powers, privileges,

and jurisdiction, and is subject to the following limitations:

(a) Power to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State and subject to the exercise of the power of Congress for the improvement of the conduct of navigation and commerce within the Port District which, when concurred in or authorized by the Legislature of both States, shall be binding and effective. (Compact, Article XVIII.)

(b) Power to make vehicular rules and regulations, with respect to the bridges, tunnels, and transportation facilities of the Port Authority, its police force being designated as peace officers of both states; to enforce, through actions in the State Courts, such regulations, as well as regulations adopted directly by legislation of the States. The violations themselves are incorporated as an integral part of the Criminal Laws of the States of New York and New

Jersey; penalties are prescribed therefor; and the inferior criminal courts of the states are given jurisdiction to enforce penal-(Chapter 388, Laws of New York, 1928; Chapter 113,

Laws of New Jersey, 1932; Chapter 599, Laws of New York, 1932; Chapter 146, Laws of New Jersey, 1932; Chapter 251, Laws of New York, 1934; Chapter 262, Laws of New York, 1934.)

(c) Power and authority to fix tolls and charges for the use of all facilities. (Comprehensive Plan, Section VIII; Chapter 4, Laws of New Jersey, 1931; Chapter 47, Laws of New York, 1931; and

all Bridge Statutes.)

(d) Bonds and certain obligations of the Port Authority are by legislative enactment made legal for investment by fiduciaries in (Chapter 57, Laws of New Jersey, 1925; Chapter 210, Laws of New York, 1925; Chapter 761, Laws of New York, 1926; Chapter 3, Laws of New Jersey, 1927; Chapter 300, Laws of New York, 1927; Chapter 486, Laws of New York, 1928; Chapter 114, Laws of New Jersey, 1930; Chapter 4, Laws of New Jersey, 1931; Chapter 46, Laws of New York, 1931; Chapter 47, Laws of New York,

(e) In order to protect public funds deposited by the Port Authority, the statutes of both States provide that all banks and other financial institutions are authorized to give to the Port Authority undertakings, with such sureties as the Port Authority shall approve to secure the deposited funds of the Port Authority, or in lieu of such

sureties to deposit with the Port Authority as collateral, such securities as the Port Authority may approve. (Chapter 442, Laws of New York, 1933; Chapter 150, Laws of New Jersey,

1933.)

(f) The Port Authority is authorized to make suitable rules and regulations for the improvement of the conduct of navigation and commerce in the Port of New York, which must be approved by the legislatures of both States, and the States are obligated to provide penalties for violations of such rules or regulations or of any order issued by the Port Authority within its jurisdiction. (Com-

pact, Articles XVIII and XIX.)

(g) Power to hold investigations in connection with matters pertaining to the planning and developing of the Port of New York, and for such purposes jurisdiction "of any and all persons," residing in, or owning property within the State, and power to issue subpoenas in connection with such jurisdiction. For failure to comply with such Port Authority subpoenas, the Supreme Court may, apon application of the Port Authority, commit such person to jail, or otherwise punish for contempt. (Chapter 623, Laws of New York,

(h) Orders of the Port Authority with respect to the regulation or control of port affairs within its jurisdiction are enforceable by mandamus or injunction, or any other relief appropriate to the case. Actions and proceedings involving the Port Authority are entitled to a preference "over all civil cases." (Chapter 623, Laws of New

York, 1924.)

(i) The powers of the Port Authority with respect to the construction of public highways within the Port District, in connection with the execution of the Comprehensive Plan, are such as are set forth by the Compact, Comprehensive Plan, and Statutes thereafter adopted by the two States.

(j) The Port Authority has, among others, certain powers enumer-

ated by Article VI of the Compact.

(k) In addition to the powers conferred by the Compact, the Port Authority has such additional powers and duties as have been, or may hereafter be delegated to or imposed upon it by the action of the legislature of either State, concurred in by the legislature of the other. The Port Authority can not pledge the credit of either State except by and with the authority of the legislature thereof. (Compact, Article VII.)

(1) The Compact provides that nothing therein contained shall impair the powers of any municipality to develop and improve por

and terminal facilities. (Compact, Article IX.)

(m) The Compact directs the Port Authority to make plans, from time to time, for the development of the Port District, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, the Compact provides that they shall be binding upon both States with the same force and effect as if incorporated in the Compact

itself. (Compact, Article XI.)

(n) The Port Authority may from time to time make recommendations to the legislatures of the two States or to the Congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the Port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious

handling of such commerce. (Compact, Article XII.)

(o) The Port Authority may petition any interstate commerce commission (or like body), public service commission, public utility commission (or like body), or any other federal, municipal, state, or local authority, administrative, judicial, or legislative, having jurisdiction in the premises, for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the Port Authority may be designed to improve or better the handling of commerce in and through said District, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the Port. (Compact, Article XIII.)

(p) The States of New York and New Jersey have reserved the right to add to, modify, or change any part of the Comprehensive Plan, with the concurrence of the other. (Comprehensive Plan, Sec-

tion 7.)

(q) The Port Authority is authorized and directed by the two
330 States to proceed with the development of the Port of New
York in accordance with the Comprehensive Plan as rapidly as
may be economically practicable, and is vested with all necessary
and appropriate powers not inconsistent with the Constitution of the
United States or of either State, to effectuate the same, except the
power to levy taxes and assessments.

96. In connection with the construction of Inland Terminal No. 1, as a part of the Comprehensive Plan, the Port Authority did condemn and take through legal procedings, a number of parcels of improved real estate in the Borough of Manhattan. The power of the Port Authority so to do was upheld by the Special Term of the Supreme Court of the State of New York held in and for the County of New York in the case of The Port Authority v. Lattin, N. Y. L. J. December 3, 1930.

97. By special statutes of the States of New York and New Jersey, it is provided that the Port Authority shall be exempt from state and municipal taxation with respect to all property of the Port Authority. The statutes of the two states enacting the Comprehensive Plan, provide that "the bonds or other securities issued by the Port Authority shall at all times be free from taxation by either state."

98. That the following are among the facts with respect to the

character and activities of the Port Authority.

(a) There are no stock and no stockholders; the Port Authority, although in corporate form being wholly owned and controlled by two sovereign states, and not by any private persons or corporations;

(b) All projects are operated in the interest of the public and no

profits inure to the benefit of private persons.

(d) The States of New York and New Jersey obligated themselves to the payment of the administrative expenses of the Port Authority, each in the amount of One Hundred Thousand (\$100,000) Dollars per year, until the revenues of the Port Authority were ade-

quate to meet its expenditures. (Compact, Article XV.)

(e) The Congress of the United States has itself declared (Public Resolution 66-67th Congress-H. J. Res. 337) that the activities of the Port Authority under the Comprehensive Plan "will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."

(f) Certain statutes of the States of New York and New Jersey have stated with respect to the various projects of the Port Authority that they are "in all respects for the benefit of the people of the two States, for the increase of their commerce and prosperity and for

the improvement of their health and living conditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance, and operation and in carrying out the provisions of law relating to the said (bridges and tunnels) and shall be required to pay no taxes or assessments upon any of the property acquired by t for the construction, operation, and maintenance of such (bridges and tunnels)." (Chapter 37, Laws of New Jersey, 1925, Section 7; Chapter 210, Laws of New York, 1925, Section 7; Chapter 6, Laws of New Jersey, 1926, Section 7; Chapter 761, Laws of New York, 1926, Section 7; Chapter 3, Laws of New Jersey, 1927, Section 7;

Chapter 300, Laws of New York, 1927, Section 7; Chapter 4, Laws of New Jersey, 1931, Section 14; Chapter 47, Laws of New York, 1931, Section 14.)

The following data applies to the circumstances of the employment of Montgomery B. Case during the year 1931, the year covered by the petition filed with the Board of Tax Appeals on April

28, 1934, and assigned Docket No. 75816.

99. Montgomery B. Case was employed by The Port of New York Authority pursuant to a resolution of the Commissioners of the Port Authority dated March 3, 1927, as Engineer of Construction at a salary of \$12,000 per year. Prior to the year 1931, Mr. Case's salary had been increased to \$16,000 per year. Said employment was to take effect and did take effect on April 1, 1927, and continued until Mr. Case left the employ of the Port Authority on December 31,

333 100. Upon entering the employ of the Port Authority Mr.

Case took the following oath:

"I, Montgomery B. Case, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Engineer of Construction of The Port of New York Author-

ity according to the best of my ability."

101. It was understood that the petitioner was to be at the offices of the Port Authority in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 Noon on Saturday, the normal working hours for all Port Authority employees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties he would, whenever necessary, devote such extra time to his duties as might be required without extra compensation.

102. As Engineer of Construction Mr. Case was the executive head of the Construction Division of the Port Authority's Engineering Department and had direct charge of all construction forces working on the George Washington Bridge, Bayonne Bridge, Holland Tunnel, and Midtown Hudson Tunnel during the year 1931. His duties were prescribed by the Chief Engineer of the Port Author-

ity to whom Mr. Case was required to and did submit weekly reports, and from time to time he was required to make such

further reports as the Chief Engineer required.

103. In all of his duties Mr. Case was under the immediate and direct supervision of the Chief Engineer of the Port Authority and on occasions when Mr. Case differed with the Chief Engineer on matters involving construction or on other matters within the scope of his employment he was directed to proceed in accordance with the direction of the Chief Engineer.

104. Mr. Case was furnished with an office by the Port Authority in the Engineering Department of the Port Authority's general

offices and he was supplied with all necessary supplies and materials by the Port Authority. His office force, engineering assistants, draftsmen, and stenographers were supplied by the Port Authority and were regular employees on the payroll of the Port Authority. Traveling expenses and all other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority.

105. During the year 1931 Mr. Case had no outside office and no outside business associations or connections of any kind whatsoever. During said year he did no engineering work other than that performed in his capacity of Engineer of Construction for the Port Authority and received no outside income except income on securities

held or owned by him during that year.

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106. Mr. Case's name appeared on the payroll of the Port Authority and he was required to sign that payroll as were

all employees of the Port Authority.

The following data applies to the circumstances of the employment of E. Morgan Barradale during the year 1933, the year covered by the petition filed with the Board of Tax Appeals on September

19, 1934, and assigned Docket No. 77376.

107. E. Morgan Barradale was a member of the staff of the New York-New Jersey Interstate Bridge and Tunnel Commission from 1919, the date of its organization, down to the time of the merger of that Commission with The Port of New York Authority on May & 1930. He has continued as an employee and a member of the saff of The Port of New York Authority from the date of the merger, with the title of Superintendent of Tunnel Operations, down to the present date. During the year 1933, Mr. Barradale received from the Port Authority in salary the sum of \$10,174.97.

108. As an employee of the New York-New Jersey Bridge and Tunnel Commission, Mr. Barradale had taken an oath of office.

109. It was understood that the petitioner was to be at the administrative offices of the Holland Tunnel in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9

A. M. to 12 Noon on Saturday, the normal working hours for all Port Authority employees except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties he would, whenever necessary, devote such extra time to his duties as might be required without any extra ompensation, and, as a matter of fact, because operations in the Holland Tunnel and other Port Authority facilities are twenty-four lour operations, it would be necessary for Mr. Barradale throughout his period of employment to devote a large amount of additional time to his work.

110. As Superintendent of Tunnel Operations, Mr. Barradale is in charge of the operation and maintenance of the Holland Tunnel and had direct charge of all Port Authority employees engaged in tunnel operations during the year 1933. His duties were prescribed by the Assistant General Manager in Charge of Operations to whom Mr. Barradale was required to submit daily, weekly, monthly, and annual reports, and from time to time he was required to make such further reports as the Assistant General Manager in Charge of Operations required.

111. Furthermore, Mr. Barradale was required to and did submit a monthly time report showing the number of hours worked on each and every day during the month, the number of hours spent in connection with each of the several activities undertaken by him in the course of his employment, and the number of hours worked

each day over and above the seven standard hours.

112. In all of his duties Mr. Barradale was under the immediate and direct supervision of the Assistant General Manager in Charge of Operations and on occasions when Mr. Barradale differed with the Assistant General Manager on matters within the scope of his duties he was directed to proceed in accordance with the

direction of the Assistant General Manager.

113. Mr. Barradale was furnished with an office by the Port Authority in the Administration Building of the Holland Tunnel in New York City and was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and other assistants were supplied by the Port Authority and were regular employees on the payroll of the Port Authority. Traveling expenses and all other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority.

114. Mr. Barradale had no outside business connection during the year 1933 except for his office and position as Director and President of the South Orange Building and Loan Association. During the year 1933 Mr. Barradale received no outside income except fees from said South Orange Building and Loan Association and income de rived from rents or interest on securities held or owned by him during

that year. 115. Mr. Barradale's name appeared on the payroll of the Port Authority and he was required to sign that payroll as were all em-

ployees of the Port Authority.

The following data applies to the circumstances of the employment of Philip L. Gerhardt during the year 1933, the year covered by the petition filed with the Board of Tax Appeals on Sep-

tember 19, 1934, and assigned Docket No. 77375.

116. Mr. Gerhardt was employed by the Port Authority pursuant to a resolution of the Commissioners of the Port Authority dated May 7, 1931, with the title of Industrial Consultant at a salary of \$8,500 a year. During the year 1933, however, Mr. Gerhardt received a salary of \$8,137.50, as result of a salary reduction applicable to practically all Port Authority employees during that year. Mr. Gerhardt's employment was effective May 16, 1931, and has continued to the present date.

117. On entering the Port Authority's employ Mr. Gerhardt took

the following oath:

"I, Philip L. Gerhardt, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Industrial Consultant of The Port of New York Authority according to the best of my ability."

118. It was understood that Mr. Gerhardt was to be at the office of the Port Authority in New York City on each and every working day from 9 A. M. to 5 P. M. and from 9 A. M. to 12 Noonson

Saturday, the normal working hours of all Port Authority 339 employees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to his Port Authority duties he would, whenever necessary, devote such extra time to his duties as might be required, without any extra compensation. As a matter of fact, Mr. Gerhardt's duties in connection with the operation of Inland Terminal No. 1 constantly required his presence at the office of the Port Authority at hours other than and in excess of the normal working hours for other Port Authority employees.

119. As Industrial Consultant Mr. Gerhardt's duties as assigned for the year 1933 involved the design of the building from an operations standpoint and the general supervision of the operation and rental of Inland Terminal No. 1. His duties were prescribed by the General Manager of the Port Authority to whom Mr. Gerhardt was required to submit such reports on matters of operation and rental as the General Manager may, from time to time, require. In all of his duties Mr. Gerhardt was under the immediate and direct supervision of the General Manager of the Port Authority, and on occasons when Mr. Gerhardt differed with the General Manager on matters involving operations or rental or on other matters within the scope of his employment, he was directed to proceed in accordance with the direction of the General Manager.

120. Mr. Gerhardt was required to submit monthly time reports itemizing the number of hours worked in each day and describing the work performed, the number of hours spent in connection with each type of work and the number of hours worked each day over and above the seven standard hours. These time. reports were approved over the signature of the Real Estate Agent of the Port Authority, in whose general offices Mr. Gerhardt's office

121. Mr. Gerhardt was furnished with an office by the Port Authority in the Port Authority's general offices and he was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and the personnel of his staff engaged in the management, operation, and rental of Inland Terminal No. 1, were supplied by the Port Authority and were regular employees on the payroll of the Port Authority. Traveling expenses and all other

expenses incurred by him in connection with the performance of his

duties were paid by the Port Authority.

122. Mr. Gerhardt had no outside office and no outside business association or connection of any kind whatsoever during the year 1933. He received no outside income during the year 1933 except a small amount of bank interest.

123. Mr. Gerhardt's name appeared on the payroll of the Port Authority and he was required to sign that payroll, as were al

employees of the Port Authority.

(Sgd.) Julius Henry Cohen, Counsel for Petitioners.

(Sgd.) HERMAN OLIPHANT,

General Counsel for the Department of the Treasury.

Dated January 21, 1936.

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List of exhibits to stipulation of facts 341 Contents Exhibits A-Preliminary Joint Report of the New York-New Jersey Port and Harbor Development Commission_. B-Joint Report with Comprehensive Plan and Recommendations____ C—Public Papers of Governor Alfred E. Smith—1920

D—Public Papers of Governor Miller—1921

E—Port Authority Statutes—Sixth Edition and Cumulative Supplement to June 1, 1935_ F-Report with Plan for the Comprehensive Development of the Port of New York. G-Complete Series of the Annual Reports of the Port Authority (1921 to 1934, inclusive). H-Port Authority Statutes (Supplement) Fifth Edition___ I-Report of New York Interstate Bridge & Tunnel Commission to the. Legislature of the State of New York, 1919___ J-Report of New Jersey Interstate Bridge & Tunnel Commission to the Legislature of the State of New Jersey, 1919_____ K—Distribution of Port Authority Revenues_____ L-Loan Agreement between United States of American and Port Authority M-Specimen copies of all bonds (bound in pamphlet)_ N-Stenographic Report of Public Hearing held October 1, 1929, at Port Authority offices_ O-Copy of Resolutions of the Port Authority authorizing and approving the construction of Inland Terminal No. 1——Agreement between Port Authority and Trunkline Railroads, dated December 31, 1930---Series of Building Advertisements.___ -List of Miscellaneous Securities_____ S-Traffic Promotion Reports----

Modification of stipulation of facts

Counsel for the Commissioner of Internal Revenue requested be released from Paragraph 98 (a) of the printed Stipulation Facts. With the consent of counsel for the taxpayers, the text this Paragraph, which originally read: "There are no stock and stockholders; the Port Authority, although in corporate form, better wholly owned and controlled by two sovereign states, and not by any private persons or corporation," was modified to read: "There is no stock and are no stockholders, the Port Authority not being owned or controlled by any private persons or corporations." Counsel for

the taxpayers stated that he would not undertake specifically to prove the portion of that Paragraph of the Stipulation released, since it was the petitioners' position that no judicial tribunal could find otherwise than that the two states, by virtue of the Compact creating the Port Authority, own and control the Port Authority.

Stipulation re exhibit L to stipulation of facts

By agreement of counsel for all parties it was stipulated that shortly prior to February 1, 1936, the Loan Agreement of September 1, 1933, between the United States acting through the Federal Emergency Administration of Public Works and the Port Authority, and the Supplemental Loan Agreement of March 18, 1935, between the same parties, which are designated "Exhibit L" to the Stipulation of Facts, were canceled, and in lieu of the loans provided to be made. thereunder a grant of \$4,780,000.00 to the Port Authority has been made by the Public Works Administration.

Petitioners then rested their case.

Counsel for the petitioners reserved, however, the further right to introduce either a stipulation or testimony with regard to the facts as to the employment of the petitioners Wilson and Mulcahy, which were not included in the printed Stipulation of Facts.

Recital as to respondent's exhibits A, B, and C

There was received in evidence, subject to objection by counsel for the taxpayers upon the ground of irrelevancy and immateriality, the . following documents designated Respondent's Exhibits A, B, and C, respectively:

Respondent's Exhibit A consisted of a copy of a letter from Julius Henry Cohen, General Counsel for the Port Authority, to Hon. E. H. Outerbridge, Chairman of the Commissioners of the Port Author-

ity, dated April 26, 1921.

Respondent's Exhibit B consisted of a copy of a letter from W. G. Besler, President and General Manager of the Central Railroad of New Jersey, to Hon. E. H. Outerbridge, Chairman of the Commissioners of the Port Authority, dated September 15, 1921.

Respondent's Exhibit C consisted of a copy of an opinion of the Attorney General of the State of New York, Charles D. Newton, addressed to Hon. James H. Wendell, State Controller, dated May 12, 1921.

These exhibits are not incorporated herein, but are included in the record as physical exhibits.

Stipulation re opposition to Port Authority's proposed program

By agreement of counsel it was stipulated that during the early years of the Port Authority, to wit, during 1921 to 1924 or thereabouts, there was substantial opposition to one or more of the details of the Port Authority's proposed program, and that this opposition came to some extent from some of the trunk line railroads entering the Port District, as well as from civic bodies within the Port District.

Counsel for the taxpayers accepted this Stipulation for the petitioners, only for the purpose of expediting the present record, and without prejudice to any other case in which the same issue of fact

may become relevant or material.

Mr. Brabson. I told Mr. Cohen that I would offer in evidence a copy of the proposed agreement between the Port of New York Authority and the City of New York, which was the agreement which formed the basis of the Bush Terminal suit, and I offer that at this time—a copy of it—in evidence.

Mr. Cohen. We object to it, sir, upon the grounds that it is immaterial and irrelevant. It was never executed. Your

Honor will find in the judicial opinions which we have handed up to you, photostatic copies of the decision by Mr. Justice Frankenthaler in the Bush Terminal Company against The City of New York, and I am sure, if your Honor will read that opinion, you will see that the agreement itself adds nothing to this record of any benefit or any value at all. This is a proposed agreement made pursuant to a statute which authorized us to pay, in lieu of taxes, to the municipality, the same sum that was paid.

The Member. You object to it because it is not an agreement? Mr. Cohen. Upon that ground, and also upon the ground that even

if it were an agreement it has no bearing upon the issues here.

The Member. I don't see how that would apply, if it were some-

thing that it isn't. Isn't that a sound suggestion?

Mr. Brabson. I don't think so, your Honor. The Member. A proposed agreement?

Mr. Brabson. If your Honor please, the taxpayers' counsel has stated here in open court that this is a copy of a proposed agreement between the City of New York and the Port of New York Authority. Now, it is a fact that they have also stated that they don't object to having any fact in here, in the record, which will throw any light on this case. Now, we offer this as showing that the Port of New York Authority did not have any exemption for the purposes of taxation in the Municipality of New York, and for that reason

they found it necessary to apply to the legislatures of the States of New York and New Jersey, or, rather, they found it necessary to apply to the legislature of the State of New York, and obtain permission to execute a contract of that sort, and

this is what they attempted to execute, and this is what the Bush Terminal suit, to which counsel has himself referred and brought

into this record—is the basis of that suit.

Now, in order to clarify the issues in that suit, so that your Honor can see what it is all about, I think the subject matter of the suit which was brought into the record by counsel, ought to be put in evidence.

The Member. The objection is sustained.

Mr. Brabson. The record will show an exception, please.

Counsel for the petitioners then submitted to counsel for the Commissioner of Internal Revenue a proposed stipulation with regard to the facts as to the employment of petitioners Wilson and Mulcahy. Counsel for the Commissioner stated that he could not agree to the stipulation on the ground that it did not contain a number of facts he desired to have in evidence as to their functions and duties. He stated that those facts would be developed from an examination of the witnesses.

Whereupon Philip L. Gerhardt summoned as a witness on behalf

of the respondent, being duly sworn, testified as follows:

I am one of the taxpayers in this series of consolidated cases.

(The facts as to Mr. Gerhardt's residence and employment are set forth in the Stipulation of Facts, paragraphs 1, 2, and 116 to 123, inclusive.)

I have certain duties as an employee of the Port Authority in connection with the management and operation of the Inland Terminal or the Commerce Building, but I did not have anything to do with the acquisition of the properties by the Port Authority which are now occupied by the Commerce Building, nor did I have anything to do with the selection of the site for that building. I am not informed who selected the site for the building, masmuch as I was not an employee of the Port Authority at that time.

When I joined the staff of the Port Authority the building was not completed, being still in the design stage. I had nothing to do with the designing of it. I did have something to do with the space to be allocated to the various facilities in the building. From the standpoint of coordination of the operation of the Inland Terminal portion of the building, my employment had to do in part with planning how it would fit in with the design of the building.

The railroads which use the terminal facilities in the Commerce Building are the Baltimore & Ohio; the Delaware, Lackawanna & Western; Pennsylvania; New York, New Haven & Hartford; New York Central; Lehigh Valley; Erie Railroad; and the Central Railroad of New Jersey. This includes all of the trunk line railroads entering New York City or having facilities on the western shore of the Hudson River. The West Shore Railroad does not use the Inland Terminal except by its own shippers in connection with the

New York Central. That is, the West Shore does not use it except by its control of the New York Central and routing of the West Shore freight which comes into that station. The freight of the West Shore does not come into the Inland Terminal.

The West Shore is not a trunk line.

The Long Island Railroad used the terminal in connection with the Pennsylvania. It is not a party to the contract of lease with the Port Authority. It is not a trunk line. There is one other railroad in the Port district which does not use the Inland Terminal, and that is the New York, Ontario & Western, which is not a trunk line.

I am familiar with the design and construction of the Commerce Building. There are approximately 2,373,140 square feet of floor space in the building, of which, excluding the Port Authority's office space, 50,000 square feet are devoted to general office space, about 1,750,000 square feet are devoted to loft and manufacturing purposes, and between 250,000 and 275,000 square feet are devoted to freight terminal purposes. I do not challenge the statement that the Commerce Building is one of the largest buildings of its kind in the It has 15 floors, a basement, and a subbasement. Thirteen floors are devoted to commercial purposes. Two floors, consisting of a street level and a basement are devoted to the Inland Terminal. The second floor of the building has been devoted recently for exhibit purposes; that is, for the purposes of trade and industrial work. That floor is known as Commerce Hall. Commerce Hall is leased by the Port Authority in the interest of creating new business by means of industrial or trade expositions.

Part of the street level floor is also used as store areas, and is devoted to conveniences for the building. There is a barber shop, a beauty shop, a cafeteria, a United States Post Office, and a bank. All of those facilities are occupied and operated by outside concerns except, of course, the Post Office. They all pay rents to the Port Authority for the space they occupy. These store areas occupy about 5 per cent of the first floor. The remainder of the floor, approximately 95 per cent, is occupied by Inland Terminal No. 1.

The gross tonnage capacity per annum of Intand Terminal No.1 is calculated at 680,000 tons. In the first year's operation the freight handled was approximately 40,000 tons. There was a substantial increase in the second year's operation, about 72 per cent increase over the first year of operation. I do not know what percentage of the gross income of the Commerce Building was derived from the upper stories, and what percentage from the Inland Terminal portion of the building during the first and second years of operation, but that information is shown in the Port Authority's annual reports. The revenue from the non-terminal part of the building annually produces more income than the Inland Terminal portion.

I did not have anything to do with the employment of Brown, Wheelock, Harris & Company as agents for the Commerce Building.

but I do know that they were so employed as agents for the building, and, I know as a fact that they actually solicited business to come into the Commerce Building. I cannot say whether they solicited tenants from the Bush Terminal Company's buildings or not. I do know that there are tenants now in the Commerce Building who formerly occupied space in the Bush Terminal

(Mr. Gerhardt's testimony above with regard to the Bush Terminal Company and its tenants was admitted over the objection of counsel for the petitioners on the ground that it was immaterial and irrelevant, and a like objection was made to all such testimony with regard to the Bush Terminal Company tenants, which follows.)

These tenants were the New York Blanking Company and Wheel Parts & Manufacturing Company. They were not brought into the building as tenants through the solicitation of Brown, Wheelock,

Harris & Company.

I know a Mr. Andre Benel, who is a Vice President of Brown, Wheelock, Harris & Company, and I know that in that capacity he solicited tenants for the building. There was an agreement between the Port Authority and Brown, Wheelock, Harris & Company, of which Mr. Benel is a Vice President. I do not know where Mr. Benel solicited tenants from, since the firm was an independent brokerage concern with many men working for it, and I would have no knowledge of what those brokers might or might not do.

I did have incidentally some connection with tenants coming into the building. I had something to do with the coming of the United Cigar Stores Co. into the building. I did not actively solicit their business, no member of the Port Authority, to my knowledge, did

solicit their business. As I recall it the contact with United Cigar Stores Co. was made through some broker in Chicago whom Mr. Morrow had requested to ascertain what locations they could get in New York. Mr. Morrow was then President of both the Gold Dust Corporation and United Cigar Stores Co., or in some financial relationship that controlled both companies. According to my recollection they came to our office. At that time the United Cigar Stores Co. had space in the Bush Terminal Building. The company did not take space in the Commerce Building and I cannot tell why it did not.

(The above line of testimony with regard to the United Cigar Stores was admitted over the objection and exception of counsel for

the petitioners.)

The Port Authority has not offered free rent to tenants to come into its building. They have made a sliding scale of rents where heavy moving expenses were involved, but no tenant was actually given free rent. The entire transaction, in any case, simply took everything into consideration. In establishing a sliding scale of rentals, the Port Authority did exactly as anyone would do who was attempting to meet the depressed conditions. The rentals offered in the Inland Terminal Building were higher than those offered in

the ordinary loft building in this City. I do not know of a single specific case of a single tenant who was given a concession in rent for a period of time at the beginning of their lease in order to induce them to take a longer lease in the building. But such concessions were given in order to consummate an agreement, taking

into question all the considerations with which the tenant was faced. Tenants with whom such arrangements were made in-

Cluded the New York Blanking Corporation, Wheel Parts, and Nestle LeMur, all of whom moved into the building before it was fully completed. The concession made to these companies was to permit them to occupy their premises until the building was finished and at least in an operatable condition, and probable for two to four months thereafter. The Port Authority has assumed absolutely no

old leases of any tenant whatsoever.

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F. W. Woolworth & Company occupied space consisting of one floor in the Commerce Building. The nature of their business is stock distribution and warehousing, together with executive offices and buyers' sampling room. In the course of their stock distribution they store stocks of goods there. The fourth floor of the building immediately above the Woolworth Company is occupied by the Malina Company, yarn converters. It is a manufacturing business or process. The majority of the fifth floor is occupied by Inter-State Department Stores. They use the space for stock distribution, buying, and executive offices. The remaining floors of the building are occupied by like tenants in substantially like capacities, except the fifteenth floor.

I know what the business of the Bush Terminal Company is. (Mr. Gerhardt's following testimony with regard to the Bush Terminal Company and similar companies, and the nature of their business, was admitted over the objection of counsel for the petitioners as irrelevant and immaterial.) They are shippers. They operate ware-

houses as distinguished from buildings used for stock dis-353 tribution. They operate railroad yards, car floats, tugs and trucking operations. I think they have 126 warehouses in the Port district, all of them located in South Brooklyn. None of their

warehouses are located on Manhattan Island.

I also know of the New York Dock Company and of their functions and operations. They operate the same sort of facilities as the Bush Terminal Company, that is, warehouses as distinguished from buildings used for stock distribution. They operate piers, railroad yards, car floats, and general terminal or marine terminal operations in New York Harbor. It is a private corporation. The New York Dock Company has no storage buildings or warehouse buildings on Manhattan Island that I know of. There is a building on Eleventh Avenue at 26th Street known as the Starret Lehigh Building owned, I believe, by the Pioneer Land Company. Their business is the rental of loft space. I do not know what distance that building is from the Port Authority Commerce Building. The

Commerce Building is at Eighth Avenue and 15th Street while the Starret Lehigh Building is at Eleventh Avenue and 26th Street. That building does not do a similar business to that of the Port Authority Commerce Building. The Commerce Building rents commercial areas as distinguished from loft space. Loft space is bare space in a poor location with a minimum of facilities. There is a considerable distinction between that type of space and the space rented by the Port Authority. The buildings are not comparable

in their construction or location, nor are they comparable in the sense that they were designed to house the same industries.

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There is no competition between them. However, I should not want to be as broad as to say that there is no competition between the Commerce Building and any other building in New York City. It is not in competition with the Starret Lehigh Building, with Bush Terminal Company, with the New York Dock Company, nor with any of the buildings of the members of the Warehousemen's Association. Some competition has developed by reason of the growth and development of Fourth Avenue because that section has been cleaned up. I should say more specifically that any building on Fourth Avenue from 23rd Street probably to 34th Street which is used for office purposes or sales purposes is in competition with our building.

The Commerce Building is a peculiar building; that is its value. There is a certain bringing together of operations. Where there is a certain need for the bringing together of operations in that respect, if a man can bring those together with his executive offices and with his manufacturing, then he can use our building. There is no other building in New York for the class of people who have looked at our building that is adaptable for them to do what they can do in our building. That is why I take the stand that we are not in competition. I do not mean that there are no other buildings on Manhattan where prospective tenants can combine executive offices with loft space; I mean that there is no building on Manhattan or any place else in the Port of New York that I know of where the Woolworth Company could put their whole operations on one floor.

I am trying to make the distinction for you.

I am not informed whether the several trunkline railroads still operate all of their pier stations on Manhattan. Some have closed up. Some have transferred. I am not prepared to state whether they are all in operation or not. I do not know whether any of such pier stations have been "dried up" by the Port Authority Building or not, since that is not a part of my duties.

The operating personnel of the Commerce Building is approximately 92 men. That consists of a superintendent of the building and a staff of employees under him. The superintendent does not have charge of the entire building and its operation, since the Inland Terminal facilities are operated by the trunk line carriers. He does

have superintendence over the Inland Terminal space from the standpoint of maintenance of the property and supplying facilities to it.
There are freight elevators in the building running from the upper
floors down onto the floors occupied by the Inland Terminal but
we do not classify the elevators as a part of the terminal facilities.
Employees of the Port Authority do operate those elevators, and
those building elevators are used to transfer freight from the upper
floors of the building down into the terminal facilities. That is part
of their function. These elevators have other functions in taking
freight that does not arrive by railroad up and down the floors to
the tenants in the building.

The revenue receipts from the Commerce Building are not classified into terminal operations and building operations. The revenue sheet for the building shows returns from the various services rendered including rent, steam, and electricity, and miscel-

laneous services such as repairs.

The several railroads using the Inland Terminal employ a joint operating agent who is in charge of the freight station. I do not know what his duties are. He has no charge whatever over the

Port Authority employees.

I am familiar with the handling of the freight incoming and outgoing in the Inland Terminal in a general manner. The handling of freight in and out of the Inland Terminal is not by the Port Authority employees. The only freight that is handled by Port Authority employees, that is, passing through the station, is that of the people who occupy the upper floors of the building. All other freight into that station either for delivery or dispatch is handled by railroad employees. A substantial part of the freight which is delivered to the station from the floors above is handled by Port Authority employees. None of the Port Authority employees work in what is known as the Inland Terminal space. The elevators in that space are not handled by Port Authority employees. The freight elevators in the building which are operated by Port Authority employees do not go into the Terminal space; they go down into a small area adjacent thereto and open out on to a platform on the same level so that anyone going up and down thereon is independent of the station. There is no overlapping whatever in the elevator service which is attributable to the Terminal part of the building and that which is attributable to the Port Authority part of

the building. It is true that these elevators that operate from the upper floors do open out on the Inland Terminal floors. They open on to a platform that is on the same level as the Terminal stations, and the freight goes through a door into the Terminal station. The freight on these elevators that comes down from the upper floors is ordinarily handled by the Port Authority employees. Other freight is handled by the employees of the several railroads.

The Terminal facilities of the Commerce Building are leased to eight railroads exclusively. It is not used by any other railroads that I know of, nor is it used by any ferry company or bus lines. It is

used by the American Railway Express Company. So far as I know the railroads have the sole voice in the operation and management of the Inland Terminal facilities. The only facilities for the handling of freight other than the space in this building which are owned by the Port Authority consists of some small internal trailers, and two small electric tractors, which facilities the Port Authority makes available to its tenants for their use in getting freight up and down from this platform on the first floor.

I do not mean to create the impression that the Commerce Building has no space devoted to warehousing purposes. However, I do make a distinction in my own mind between a warehouse and a building for stock distribution. A warehouse is a space which differs in its construction from the Commerce Building. It may vary from a mill-constructed building to a concrete bare building where large

quantities of merchandise are put into rest until they are taken out in large quantities, but somewhat smaller than the original deposits. They generally deal with raw commodities or semifinished commodities. While, on the other hand, the stock distribution center handles finished commodities which turn over rapidly and which are turned over directly to customers, or into that channel. There is a distinction in the character of business which is done. There is a distinction in the method of doing business, a distinction in the character of service that is to be supplied. For instance, the Woolworth Company is not conducting a warehouse company as it is technically known in transportation and terminal work. The Commerce Building does offer space in which warehousing can be conducted.

There is no physical connection such as railroad tracks between the Inland Terminal and any railroad, nor with any dock, pier, wharf, or other marine facilities. All of the freight incoming and outgoing, is handled by trucks. The Inland Terminal is four or five blocks from the nearest pier or waterfront. The Inland Termi-

nal is not a part of any electric underground system.

The several railroads which leased space in the building have separate freight stations of their own outside of the building. I do not know what percentage of their freight goes through the Inland Terminal nor the ratio between freight handled by the Inland Terminal less-than-carload freight originating in the Port of New York. By no stretch of the imagination would all of the less-than-carload

freight come in through the Inland Terminal. In establishing a ratio you must consider only the territory from and to which

the Terminal would naturally feed.

I have had nothing to do with the advertising of the Commerce Building. The facilities of Commerce Hall are for trade and industrial expositions. It is a fact that Commerce Hall was used for the Ford exposition. Expositions similar to the Ford exposition have not been held at Grand Central Palace in New York. Grand Central Palace did not house the Ford exposition because it was not big enough and did not have the facilities.

At this point counsel for petitioners conceded that the series of advertisements introduced in evidence as Exhibit N were paid advertisements. It was further conceded by counsel for petitioners that the Port Authority has expended considerable sums of money in advertising the Commerce Building in various trade journals and in publications of like character. It was further conceded by counsel for petitioners that Commerce Hall has been advertised separately from the other facilities in the Commerce Building, and that the facilities of the Inland Terminal have been used in such advertising as inducements to have tenants move into the Commerce Building.

At this point counsel for the respondent introduced in evidence without objection, as Respondent's Exhibit D, a clipping from the New York Times newspaper, and counsel for the petitioners conceded that this clipping is an example of the type of advertising of the building used by the Port Authority, and that it was a paid

advertisement.

The automobile show has never been held in Commerce 360 Hall. After the Ford show the automobile people have from year to year made inquiries and have come and looked at the premises. But at all times they have renewed their leases at Grand Central Palace. I do not know whether they were solicited by Brown, Wheelock, Harris & Company, for that purpose but I have

reason to believe that they were not.

Brown, Wheelock, Harris & Company were not interested in Commerce Hall. They handled the warehousing space. There was no allocation of space ever made to Brown, Wheelock, Harris & Company that I know of. They were not by contract made agents for any designated space in the building; they were not the agents for the building at all. What that company would do would be the same as any other real estate broker, namely, if they had some industry that was interested in space they would probably bring the Port Authority Building to their attention. That is the full extent of the contract with Brown, Wheelock, Harris & Company. They were paid a commission on the amount of space they rented They did not have an exclusive agency on the building. Any broker who would come to the Port Authority could have secured any space that may have been available, assuming that the tenant was a satisfactory one. Brown, Wheelock, Harris & Company were in no different position from any other real estate or building broker in the city, except that they got a little additional commission for acting as the broker who might cooperate with

other brokers or the broker who would pass through them. Brown, Wheelock, Harris & Company did have authority to advertise the space in the Commerce Building subject to approval

of the Port Authority.

Warehouse space in the Commerce Building is rented at various rates, running from 60 cents to \$1.25 a foot. That rate is no lower than the commercial rate in New York City. The Bush Terminal Company leases space at from 45 cents to 50 cents a foot and probably as low as 40 cents in some cases. In establishing the rate to be charged in the Commerce Building the Port Authority made studies including studies of charges for similar space in the Bush Terminal and other buildings. Its rates were not based entirely upon those studies. The rates were based on an entire study that was made of the cost of the building, the operation of the building, the value of the space, the peculiar condition of the building, where it may apply to certain factors of tenants; and from that a rate was brought out which was higher than any commercial rate for new leases. I know that the Bush Terminal Company has not lowered its rates to meet competition with this building. I do not know that it has lowered its rates although I suspect it has.

In some cases incoming freight into the building comes from New Jersey terminals. In other cases it comes from pier stations if it is in a small quantity. I do not know where the freight originates since it comes in from all over the country. The Terminal is quali-

fied to handle a less-than-carload shipment from any line that has connections and rates and routing constructions into Inland Terminal No. 1. There are millions of tons of less-than-carload freight coming into Manhattan every year. The reports show that the Inland Terminal handled only 40,000 such tons in its first year. I know that some of the railroads which have pier stations on Manhattan have inaugurated what they call store-door delivery within the past two years.

Asked what effect such store-door delivery would have upon the Inland Terminal, my answer is as follows: That store-door delivery would have no effect upon the Inland Terminal in my opinion.

(The foregoing question and answer were objected to by counsel for petitioners as wholly immaterial and irrelevant. The objection was overruled.)

There was no cross examination of the witness, and the witness was excused.

At this point counsel for the Commissioner stated that he proposed to introduce evidence as to the volume of traffic of the various ferry companies operating over the Hudson River and of the Bear Mountain Bridge Company, covering a period of years from 1923 to 1935, and showing the gross and net revenues from those facilities by months; that the introduction of such testimony would require a van load of records and documents if the primary records were required to be produced, and that he proposed to introduce written summaries of those primary records instead. Counsel for

the petitioners stated that no objection would be made to the introduction of such summaries instead of the primary records. Counsel for petitioners further stated that in order to save time the petitioners would stipulate certain ultimate facts which the respondent hoped to prove by the foregoing offer of evi-

The following stipulations and concessions of counsel were

thereupon made as follows:

Mr. Cohen. He need not worry on that score. The only time primary evidence will come in is in case we crossexamine the witness and find that there may be some error in the statement, or some

wrong inference or summary of competition.

May I state this at the outset; perhaps it may have a lot of time. We will concede that the business of the ferry companies operating between the west and east sides of the Hudson River have diminished, and that, as a result of the furnishing of facilities like the Holland Tunnel and the George Washington Bridge, they will probably continue to diminish. If we build the Midtown Hudson Tunnel, the business and revenues of the ferries will continue to diminish. Your Honor will find, in the records already in evidence, that part of the revenue upon which bonds were sold to the public, was an increased revenue that was expected to come from people who formerly used the ferries.

The MEMBER. Well, as I understand it, your theory is predicated upon the idea that one of the hopes in the establishment of the Port

of New York Authority was the dimunition of ferry traffic?

Mr. Cohen. Certainly. The Member. Well, that is incidental to its advantages. Mr. Cohen. Certainly. Your Honor will find that that is 364

The Member. Now, is that all you want?

Mr. Brabson. If your Honor please—if counsel for the taxpayers will stipulate that, by reason of the construction and operation of the several facilities now operated by the Port of New York Authority, there has been created a competition with ferry companies across the Hudson River, and that, as a result of that, their gross volume of traffic and their revenues have been decreased accordingly, that is all we ask.

Mr. Cohen. Why, we will freely concede that the furnishing of vehicular tunnels under the Hudson River, and bridges over the Hudson River, may ultimately result in the complete wiping out of the ferries, and that the competition of that kind of service is such that it is like the wiping out of the trolley cars on the streets by the buses. Now, if we want that-or, if you want that admission, you can have it just as broad as you want it; but I do not want to make any argument now.

I think that your Honor knows what the argument is on our

side.

Mr. Cohen. May I suggest something further that may be helpful Mr. LaRoe wishes-or, rather, Mr. LaRoe suggests to me that, if I am prepared to admit upon the record that these ferries in private ownership are subject to taxation, that this will save six hours of the case. If he is correct in his advice, I will stipulate right here and now that all these ferries are operated as private companies, and that they are subject to taxation.

The Member. Subject to what kind of taxation?

Mr. Cohen. New York City taxation, income taxation on their earnings, just as any private corporation is.

Mr. Brabson. And that their revenues have been diminished ac-

cordingly?

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Mr. Cohen. Well, obviously, if they pay taxes, their net revenuesif that is what you mean-the amount available to stockholders, of course, is reduced. So I don't see any sense in putting that on. I don't see any sense in fighting over that, or in taking up the time of your Honor with it. Your Honor would, as a matter of fact, take judicial notice of that fact. How could we dispute it? Why spend six hours proving the obvious?

The MEMBER. I don't know if I would.

At this point the hearing adjourned to February 5, 1936.

Stipulation re "Comprehensive Plan"

Mr. LAROE. If your Honor please, last night we met with our friends on the other side and by means of a very brief stipulation we have saved, according to them, some six hours of record.

brief stipulation reads like this:

"It is stipulated and agreed by Petitioner and Respondent that prior to the formulation and adoption of the so-called Comprehensive Plan, there were ferry companies operating between New Jersey and New York, and that the facilities constructed by the Port of New York Authority, pursuant to the statutory plan are in competition with those ferries, have reduced their traffic and their earnings.

366 "It is further stipulated and agreed that the ferry companies so affected were either independent and privately owned ferry companies, or operated by or in connection with railroad companies serving the Port of New York District, and that in either event, the ferry companies were subject to taxation, both Federal and State, as private corporations."

I am told that that will save six hours of testimony. The Member. Do you stipulate that, Mr. Brabson?

Mr. Brabson. We do, your Honor, there is just one point in regard to it and that is a question of tense.

Mr. LAROE. The tense is important in the sense that these ferry companies were in existence long prior to the formulation of the Comprehensive Plan. In that sense the past tense is important, but we didn't intend, by this stipulation, to give the impression that, when the Comprehensive Plan came into being, the ferry companies passed out of existence, rather to give the impression that some of the

facilities created by the Port Authority pursuant to the company did compete with the ferries and continued to do so thereafter.

Mr. Brabson. That is all I ask.

367 BILLINGS WILSON, having been called as a witness on behalf of the petitioners and being duly sworn, testified as follows:

Direct examination:

Mr. Brason. Before you begin this, may I state that I have again examined the stipulation of facts, the supplemental statement of facts, as to the petitioners Billings Wilson and John J. Mulcahy and in view of that re-examination, since it does follow the form of the stipulations of fact in the case of the other three taxpayers, we are willing to stipulate that the facts contained in that supplemental stip-

ulation of facts may be received in evidence.

Mr. Cohen. That is very helpful and I shall accept it so far as Mr. Mulcahy is concerned, but since Mr. Wilson is here it will help the record and help your Honor's understanding to have his oral description of his own efforts in the light of the testimony elicited from the witness Gerhardt and since counsel suggested that they would want to ask questions we want to furnish them with ample opportunity to ask questions. Obviously, in describing his duties, incidentally, your Honor will get a picture of the activities of the Port Authority, which, of course, bears upon the contentions made by the Bureau.

Whereupon, pursuant to the right reserved by counsel for the petitioners when he had first rested for the petitioners, Billings Wilson

was called as a witness and testified as follows:

I am the petitioner in docket number 77377. I am employed as Assistant General Manager of the Port Authority and received a salary of \$14,625.00 for the year 1933. My employment has continued from July 1, 1922, to the present time. Upon entering the Port Authority's employ I took an oath of office.

I have been with the Port Authority since July 1922. Prior to that date, for at least a year and a half, I was an assistant to a consulting engineer, Mr. Francis Lee Stewart, of New York City, who was also consulting engineer for the Port Authority and for the old Bi-State Port and Harbor Development Commission in the formulation of the Comprehensive Plan; and as Mr. Stewart's assistant I sat in on a great many of the meetings of the old Port and Harbor Development Commission when the technical details of the plan were in process of formulation. I think I was in on most of the meetings between the railroad representatives and the Port Authority Commissioners and staff, at which the criticisms of the first outlines of the Comprehensive Plan were made. I am therefore familiar in a general way with both the Comprenhensive Plan as proposed by the Bi-State Commission, the predecessor of the Port Authority, and the Comprehensive Plan as finally adopted by the two States in forming a part of the compact.

In 1922, when I first came with the Port Authority, we were at that time faced with the action of the two States and of the Federal government in having recently formally approved the final compact between the two States, and the staff was assigned the task of in-

vestigating the various phases of that plan to see what was the most practical initial step that we could carry out in accordance with the mandate of the two States. It fell to my lot as a general assistant to the Chief Engineer to make an intensive study of Belt Line No. 13, so-called, which is a marginal railroad extending around the New Jersey shore of the Hudson River from Fort Lee to Bayonne, a distance of approximately 15 or 16 miles, which belt line was owned in different sections by four different railroads and operated in a very disjointed fashion, with the result that freight from Weehawken or Hoboken, destined to Jersey City or Bayonne on a different line or railroad was often hauled out as far as Eastern Pennsylvania and back again, various circuitous routes at a very high rate. The staff under my direction made a very searching analysis of railroad records and the movement of cars, freight rates, etc. in preparation for trying to carry out this particular initial step in our extensive program.

Belt Line No. 13 was not the only thing we had in mind at that time. We had the whole Comprehensive Plan in mind, but after going over the record it seemed that it was the facility that lent itself to the earliest effectuation, because it involved the lease amount of new capital investment. The rails were practically all there and it would mean that we might have to put in some interlocking plants at some of the junctions and to improve the signal system along the line and coordinate the human element that was operating the railroad. But it did not seem necessary for the Port Authority to put in a great deal of new capital, and at that time, you understand, we did not have any capital to invest, we had to develop our

370 credit structure and we were practically starting from scratch with nothing but a room full of furniture and some blue prints as our assets and legacies from the two States. So we had to begin right at rock bottom to carry out the will of the two States

as it had been given to us.

I am familiar with the language of the statute which authorizes and directs the Port Authority to effectuate the Comprehensive Plan as rapidly as economically practicable. As I understand it the words "economically practicable" imposed a duty upon the staff under my direction in taking up the steps under the Comprehensive Plan, to find those things which were at the moment economically practicable.

These investigations which the staff carried on were finally presented in 1923 to the Interstate Commerce Commission at a joint hearing with the Commissioners of Port Authority and representatives of the Shipping Board present. Before the case had proceeded to a conclusion the railroad defendants announced that they would like to have a rather lengthy adjournment because they thought that it might be possible for them to meet us more than half way on

the things that we were advocating, and as a result, the hearings were adjourned and our staff, including myself and the other members, went into a series of conferences with the railroads serving the New Jersey water front, and we were able to work out a program which the railroads themselves carried out at an expenditure of approximately half a million dollars for improving this belt line and setting up an operating committee composed of a manager from each

railroad and a representative of the Port Authority. As a matter of fact I was designated by the Port Authority as their

representative on that operating committee.

That did not involve the investment or expenditure of any capital on the part of the Port Authority. It did not seem necessary at that time. The railroads agreed to make all the necessary changes themselves and they did spend a considerable sum of money. The result was achieved by reason of factual data prepared under my direction and presented on behalf of the Port Authority first to the Interstate Commerce Commission and to the Shipping Board, and then to the carriers.

From our investigation, prior to this proceeding in which we went into the part efforts of the various trade bodies and individual shippers to secure relief from the carriers, we found that repeated efforts had been made to get relief along that section of the waterfront and that they had been unsuccessful. Therefore, there is no question in my mind as a person who worked up this case and it is absolutely my opinion that if the Port Authority had not pursued this investigation to a successful conclusion we would still have the same archaic method of railroad operation along that waterfront that existed fitteen years ago. This agreement with the railroads was concluded in 1923 and 1924.

Now, that matter did not take up all of our time. We were also going into other phases of the Comprehensive Plan, such as the question of relief for Manhattan Island. Manhattan has always been from a freight standpoint, a very congested and difficult place

to serve because it is cut off by waterways except on the north, and the great bulk of the freight traffic for Manhattan and for the ships that dock along the island water front come from the Jersey railroads on the other side. Over a long period of years the railroads themselves had not been able to develop any method of bringing the freight across the Hudson except by old-fashioned ferry boats and car floats. The first car floats came into use in New York Harbor in 1866, after the Civil War, and aside from growing a little bit bigger and the construction being changed from wood to steel, there has been no change in the method of handling railroad freight across the Hudson in the remaining sixty years, ever since that time.

So the Port Authority took up studies of the old Bi-State Commission for serving Manhattan Island, which contemplated providing this city and the millions of inhabitants on this side of the Hud-

son with an all-rail weather-proof, all-year-round serviceable freight connection for their food stuffs, their fuel, building materials, etc. At that time the only practical way, certainly for the lower end of Manhattan and where the ground is flat on both sides of the river, seemed by tugs and that is the plan we started out on—the idea of a series of stations removed from the waterfront of Manhattan. The railroads were occupying about one-third of the total of Manhattan waterfront south of 59th Street, with local freight station facilities that could be better used by ocean shipping. We visualized this plan and we worked out the economic proof of it whereby the

railroads, since they did not need deep waterfrontage to berth the shallow craft, car floats, lighters, and tugs, could transfer their operations to the interior of Manhattan and release that

waterfront for deep craft trans-Atlantic superliner ships.

To reach the interior of Manhattan and the new stations, we visualized the set-up insofar as it was possible in zones of equal distance, and equal density along the island. We resorted to the idea of tunnels.

The first program we tested out was a so-called automatic electric railroad system which involved the handling of this freight from the Jersey rail shed through deep underground tunnels under the Hudson in electrical rail cars somewhat like the subway cars. The costs were very high, and since our plan and the mandate of the States also placed upon us the burden of working out some measures for prompter relief while these long-range plans and more extensive plans were being developed; and since after the World War the motor truck came into much greater prominence than it has prior to the war when it was more or less of a rarity, as the early photographs of our waterfront will show, we sensed that we could give immediate relief to this Manhattan situation by transferring this freight across the Hudson River on motor trucks, using the existing ferries in the beginning and using vehicular tunnels and bridges as they were built. In that way the entire burden of the cost of the bridges and tunnels would not be thrown on freight alone, but we ould attract passenger car traffic to assist in the carrying of the bur-

den of the freight service. Also the Holland tunnel was under construction in 1923 and 1924, and that would provide, when completed, an all-weather connection between New York and the Jersey side of the harbor through which the freight trucks could perate.

So it seemed to us we might go ahead with the inland station phase of our Comprehensive Plan, but defer the under water electric railway tunnels which we knew were enormously expensive, and move the freight across on rubber tire motor trucks, using the city streets and the public highways and these tunnel and bridge facilities in common with other passenger car traffic.

Therefore, one of the next steps that we attempted was to interest

the railroads in proceeding with this inland station idea.

The most of this development work was under my immediate supervision, or I was connected with it when I was under the Chief

Engineer. I am therefore describing my own functions.

We opened a series of negotiations with the railroads, and we found them lukewarm to the idea of giving up their present facilities, that is, their piers along the Manhattan waterfront. And while the negotiations were proceeding the railroads themselves attempted to solve the problem in another way, by introducing some trucking operations of their own. But they operated under a competitive arrangement where each railroad set up its own inland stations and immediately engaged in a series of competitive maneuvers with each other whereby they paid rent to these stations and paid a different trucking company to truck the freight. Then the question of

allowances and rebates came in until the situation became so 375 disturbed on Manhattan Island that the Interstate Commerce Commission had a proceeding before it to investigate this whole question of trucking railroad freight on Manhattan Island. Port Authority participated in that. This was about 1924. after it had progressed about a year, this investigation of trucking on Manhattan disclosed all of these objectionable practices. The Port Authority participated in this investigation and I and other members of our staff were on the stand submitting evidence.

The railroads saw the way things were going for them at that time, and it was not a very healthy growth or development of transportation facilities, and so again they indicated a willingness to negotiate with us on another phase of our plan. They appointed committees of engineers, traffic men, operating men, and conferred with our staff, and out of that grew this first union inland freight station which was built pursuant to a contract with the railroads.

From there on the development of the plans for that station and the details of negotiations with the railroads and the assembly of figures, etc., was handled by other members of the Port Authority

staff, engineers, accountants, etc.

One of our problems was to find for this first station a site that would be within our means to finance. We could not take the block that the Woolworth Building stood on or that the Custom, House 'was on or that the City Hall was on; we hoped to find a block where we could acquire certain properties and could condemn them

if necessary, and where the cost would be within the limitations of our economic practicability mandate. We made several tentative selections and discussed them with the railroads. We had to have a block that was big enough to perform all the operations, and we were trying to locate this first station in a territory that was not served so intensively by other existing railroad facilities. We selected what we called a no-man's land of transportation which extended roughly from Christopher and Hudson Streets on the south up to 24th Street on the north and the entire west side of Manhattan. Within those north and south limits there was not a nilroad freight station in that zone and it seemed an ideal place to put this first union facility because there was not any competitive influence.

The selection of blocks in that zone involved a great deal of discussion. We had several blocks in mind and it involved discussion with the municipal authorities. They had certain ideas as to how they wished to extend the regular residential section of the city and the apartment house area. They had in mind that we were going to put those in certain directions and so we tried to meet their wishes. And then the railroads had certain ideas and we tried to meet theirs, and as I say we had to avoid blocks that had parcels of property on them that we could not condemn.

We needed a large area for this station to start with. Our studies with the railroads showed that there were about 2,000,000 tons of less-than-carload or packaged freight on Manhattan Island,

south of 59th Street, for all the railroads that had to be considered in planning this new method of handling freight. It seemed in our conferences with them and it developed that three of these union stations could probably take care of that amount of freight if properly located. So as to reduce truck hauls for merchants and to space the facilities properly on the island, one of these stations would be on the upper west side, that is, roughly between Christopher Street and 59th Street; one was to be on the lower west side south of Christopher Street and down toward Canal Street; and the third station was to be on the lower east side. Now we selected with the railroads as the first step, this zone that I had referred to previously for the first of those three stations. This meant planning a facility that would take care of the freight handled contributory to that zone, which was estimated to be about 650,000

We had very exhaustive and careful plottings made which the railroads cooperated in by letting us have access to their records and to their station facilities. We interviewed truck men to find out where the lots were coming from; we made up charts to show the gross hauling going on from the different factory buildings and lofts or stores on Manhattan to those 45 different railroad pier stations around the rim of the island, and from that we started in to lay out a facility that would take care of 650,000 tons of freight a year at the street level. We found, reducing that to tons of freight per day as based on the average load per truck which was going

tops of freight per year.

to and from pier stations, which run around one or two tons per truck, that we would need a certain number. I don't carry the figures in my head but we would have to accommodate a certain number of trucks, per day at this freight station. Now, based also on plottings made as to how long those trucks had to remain at the pier stations to unload freight and to pick up loads of inbound freight, we should figure the time that each truck would have to remain at the tail board of the inland station platform. That

gave us the number of trucks per day and the normal working hours that it could occupy each of those tail board positions, and divide that into the number of trucks per day that we had to handle to take care of this, some 2,500 tons of freight per day, that gave us the number of truck positions we had to have there. Each truck position was roughly 10 feet wide by 30 feet to 40 feet long, and that gave us immediately, ranging those side by side, a measure of the space requirements we would have to have. We found at once that we would have to have a block that was at least twice as large as any block in that section of the city.

So we conceived the idea of using two floors and getting our capacity within one block area by putting half of the business on the lower floor with ramps down from the street, so it would be just as good as a street floor. That is the way the building was finally designed, with such improvements and changes and modifications as

the railroad engineers and operative men dictated.

That narrowed our selection to blocks that were possibly 800 feet long and 200 feet wide, and then by a process of elimination of blocks of that size, we came down to a choice of two or three locations, and ultimately to the choice of one which is

the location of our present facility.

On the 16th Street side of the building at the present time there are trailers that line up against the platforms, and those trailers are assigned places, one for each of the trunk line carriers, that is, for outgoing and incoming freight that goes to and comes from the

railroad depots.

At the present time the station is operating at only a small fraction of its capacity. It was built ultimately to take care of about 650,000 tons of freight. The traffic has grown steadily in the last three years since it was opened. It is now running between 60,000 and 70,000 tons a year. The operation of the terminal was started in October, 1933. For the first year of operation from October 1933 to October 1934 the terminal handled 40,000 tons. From October

1934 to October 1935 it was 60,000 or 70,000 tons.

The present operation of the railroad premises of this station work out about this way; the merchants' trucks with freight for all railroads enter 15th Street from the 8th Avenue end, that being a west bound street, and back in on the 15th Street side of this building at the street level to a freight platform, about the height of the truck side. The whole building on that side is devoted to these back-up stations that are recessed inside the building line to get the freight on the trucks. The merchant's truck arriving there anywhere along that block can pick any vacant berth and back his truck in, and the nearest railroad freight checker will check

his entire load, regardless of what railroad it goes to. Then when the merchant is through, he gets his receipt for the freight. On the freight platform the railroad companies, through their joint agent and a joint labor force, sort that freight out for the different railroads and place it on small platform trailers, which

are pushed or pulled across the platform to the 16th Street side of the building, where there are a series of large body trailers backed up, one, two or three for each railroad. Then this sorted freight is put into one of these trailers, all the Pennsylvania freight in one, for example, all the Erie freight in another, all the Baltimore and Ohio freight in another, etc., and those trailers are filled by the station forces. Tractors haul these trailers away to different rail heads. Whether it is put into those railroad cars, or whether it is a reverse operation, it is the same. In the morning it is the incoming freight; the merchant picks up the freight on the same side of the building where they deliver outbound freight.

Now the basement of the building is used in a similar manner as a union dump or consolidating point by the Railway Express Agency, which is a subsidiary for all the railroads for the handling of a large volume of railway express freight. That is a temporary arrangement between the railroad companies and the express companies, because the railroads don't need the lower floor at this time, since the station is only operating at about 10 per cent of its railroad freight

capacity.

Returning again to the phrase "economically practicable," we found that it was not economically practicable to take a whole block on Manhattan Island and just use a structure for the Inland Terminal. (The foregoing and the related testimony mmediately following were admitted over the objection of the

attorney for the respondent.)

Our studies of the cost of real estate on Manhattan Island plainly showed that if we only developed the ground area for this railroad terminal with either a floor above it or below to give us the second step that the railroads would require, we could not get enough rent from the railroads to pay the cost of the ground and the cost of the simple railroad facilities that would be required without forcing the railroads to pay more in the way of rent and operating expenses than they were paying at that time on their own facilities. Since the whole basis of the Comprehensive Plan was to reduce the cost of freight handling in the Metropolitan District, it showed us that it was not economically practicable to go into the development of such an area with a purely railroad facility, because we could not produce enough from the railroads—we would have to charge them too high rent, and that was all there was to it. So that was done by developing the air rights, not by just putting up a single sory facility on which you could not earn enough to carry roughly three or three and a half million dollar investment. So we had to build upper floors in order to make the ground floor facility available to the railroads at a lower cost than they were paying at that time for their existing facilities.

The staff, under my direction, planned the projects which were recommended to be carried out under the Comprehensive Plan from time to time by the Commissioners in the manner

which the staff found to be sufficient to insure enough income to meet the expenses of operation and maintenance as well as the interest and sinking fund requirements of the bonds which the Port Authority was authorized to issue. My staff consistently followed the rule that each project in the Comprehensive Plan as it was adopted and carried out by the Port Authority through its own efforts, had to be self sustaining in order to enable the Port Authority to raise the moneys necessary to finance it.

I can think of no circumstances in the light of my experience on the staff of the Port Authority and with all the data that I had at my command, under which an Inland Terminal of this size or anything like this size could have been established in the Borough of Manhattan for railroad use, on a self supporting basis without the addition of upper stories to be utilized for revenue producing

purposes. Mr. Cohen. I direct your attention to one of the exhibits that is in this case, the joint report, page 17 of Exhibit B. just going to use one quotation about the portion devoted to terminal purposes. "It is proposed to build two additional stories for warehouse purposes and it is estimated that the revenues that can be obtained from these additional floors will contribute materially to a reduction of the fixed charges against the system. Besides the two

warehouse floors incorporated in the design, estimates have been made of the extra cost of the revenues obtainable from two additional floors, for terminal, loft, manufacturing or

office purposes."

I ask you now whether that conclusion arrived at by your predecessors in the joint report made to the Legislatures, was also arrived at by you and your staff in studying the plans for the first series of

inland terminals for Manhattan.

The WITNESS. Not as to the detailed number of floors, but the general conclusion obtained that we would have to have additional floors in order to carry the investment in freight station facilities at no more, in fact, at less cost to the railroads than they were paying at their pier stations. We had to have the additional floors in order to carry and make this an economically practicable project. Estimates were made of the cost of the land for this entire block and those estimates were considered before the plan was submitted to the Commissioners. Estimates were made also of the cost of the building, inclusive of the terminal, of various stories, twelve, thirteen, fourteen, or fifteen. We made a number of such designs.

.Mr. Cohen. How did it come about that fifteen stories were

selected? The WITNESS. We started with this building by progressing the floors upwards on the basis of the areas that each floor gave us. We

determined how much rent we could expect to get on the existing level of rentals and then we progressed the floors upward until we reached a point that would give us just enough total rent to carry the

real estate investment plus the building cost.

The Port Authority had no taxing power, and had no subsidy from the States to build this Inland Terminal. It actually had to raise approximately \$16,000,000.00 on its own bonds to build that terminal. In order to sell those bonds to the public it had to show that the total revenues from the entire building would be adequate to pay operating expenses, a debt service, and all other incidentals to support the borrowing. The objective of my staff was to figure out the economic practicability of this scheme. There was no way by which this terminal could be achieved except by insuring sufficient revenue to support the total cost of the building. My efforts as Assistant General Manager in charge of port development were in cooperation with the carriers to work out a financial scheme that would make the Inland Terminal economically practicable. The commercialized sections of the building which I refer to as, the air rights occupied a volume of 30,000,000 cubic feet, approximately 8 per cent of which is store and office space, and 92 per cent is modern loft space construction.

(Mr. Cohen then handed to the Member the annual report of the Port Authority dated December 31, 1930, already in evidence as a part

of Exhibit G.)

Mr. Cohen. Instead of asking the witness questions, I will call your Honor's attention to some material that is already in evidence, so as to connect up with his testimony and save some time. Opposite page 43 of the annual report for 1930, your Honor will find a picture or sketch headed "Perspective of Inland Terminal No. 1." You will

bear in mind that this is the Tenth Annual Report to the two Legislatures by the Port Authority before the building was 385erected. I now ask your Honor to turn to page 43; "The proposed Inland Terminal fronts on two 100 foot avenues and is flanked by two 'one way' 60-foot streets. * * * It is but one and one-half blocks distant from a group of piers serving trans-Atlantic lines. is centrally located (north and south) in the largest package freight center in the world. It will serve and be served by all railroads entering New York by means of shuttle, automotive equipment between various railroads and the terminal. Incoming freight from all railroads will be classified and grouped for individual consignees. (One pick-up.) Outgoing freight from all merchants will be classified and grouped for shipment by individual railroads. (One dump.) All rail activities such as unloading, loading, sorting, and classifying will be accomplished with no interruption to or from normal street, pedestrian, or vehicular traffic." That is because the tracks go into the building, and they do not stop on the street.

The WITNESS. That is correct.

Mr. Cohen. As is true of the ordinary loft and factory building in New York?

The WITNESS. That is one of the great attributing factors to the expense of trucking in New York. Elsewhere than in this building it is the trucks parking at the curbs that cause congestion in the street and delay; it delays the delivery of freight to the buildings

and adds to the cost of the merchants doing business. Therefore this design of ours was intended to get around that and reduce costs in that manner very substantially.

Mr. Cohen. Would you mind, parenthetically, telling his Honor how it has worked out in the actual reduction of street

traffic, and further to shippers?

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The WITNESS. Well, from information that has come in to us in the form of letters and reports from people, from merchants who are using this building, some of which I have seen, a great many of these merchants have told us that they have made very substantial savings in the cost of trucking trade on Manhattan by reason of being able to use this single dump facility, this union station savings running as high as a dollar or a dollar and a half a ton, on every ton that they handled through it. * * * It worked out in this way: Before this station was built, in the old days, a merchant, let us say in the garment section, or the district around the 30's west of Fifth Avenue, who had outgoing shipments in the afternoon to six or seven different railroads, would load those shipments on one, two, or three trucks in order to get to the different pier stations of the individual railroads before their doors close, around 4:30 or 5 o'clock. If he had freight for five or six railroads, let us say, and if he started out in the afternoon, after his shipping and packing department got everything wrapped up and properly boxed, by the time he fought his way through the congested streets and city line at the waterfront stations of individual railroads, and tendered his one or two boxes for that first railroad, and then moved down the waterfront half a mile or three-quarters of a mile and did the same thing at another station, he might only get a half or one-third of his

another station, he might only get a hair or one-third of his load discharged before all the stations close at 4:30. But under this system he can take that entire truckload to his union station, back in at one point and with one receiving clerk unload the whole truck in twenty minutes and be back at his place of business in an hour; and he can do it all in one trip, in one stop, instead of having to go to five or six different places with the truck haul in between each, and with the same amount of delay, finding a place to park the truck, finding a receiving clerk to check his freight and give him a receipt for it. That is where he loses his time under the old system; that is where he saves his time under the new system.

The Member. Now let me ask you about the feature of getting the trucks and vehicles off the street. Have you thus far found that at all times you have had loading and unloading facilities adequate to accommodate the trucks that wanted to use them?

The Witness. There is no time during the day when there are not adequate and ample facilities. Thus far we have at all times had ample loading and unloading facilities and space adequate to accommodate the trucks that wanted to use them, in fact, surplus space. We have also provided for the peak hours of the day, even when the Terminal is called upon to handle 950,000 tons a year.

At the present time, as a matter of fact, they are not using the two floors that were designed for the traffic, except as the American Railway Express Company is using a part of the railroad service

on the basement floor. We leased both floors to the railroads, but they are only using a part of one, so that the station is not even physically used to its full capacity at the present time. The two years that have transpired since the station was erected were part of the depression years when business fell down.

Mr. Cohen. Now I read further, if I may, from page 44 of the 1930 report (Exhibit G): "All rail activities, such as loading, unloading, sorting, and classifying, will be accomplished with no interruption to or from normal street, pedestrian, or vehicular traffic.

"The basement and ground floors will be reserved for freight purposes. The structure composing the fourteen additional floors will agree with the requirements of the building code of the City of New York. The air rights commercialized occupy a volume of thirty million cubic feet, approximately 8 per cent of which will be store and office space, and 92 per cent the most modern loft space construction.

"The building will enclose 2,373,140 square feet (gross) of floor space; 152,940 square feet (gross) of which will be for office building purposes and will provide for 112,260 square feet (net) of stores and offices, 282,650 square feet (gross) assigned to Freight Terminal purposes, 1,842,000 square feet (gross) to lofts and light manufacturing purposes, and 95,550 square feet (gross) will be occupied by power, lighting, and heating equipment and service facilities.

"Those parts of the structure dedicated to freight usage consist of ramps connecting Fifteenth and Sixteenth Streets with the basement, which, except for elevator pits, elevator inspection and repair space, and necessary fire exits, is to be occupied by driveways, freight platforms, valuable-package room, locker rooms, toilets, mobile equipment, repair shop, and employees' lunchroom.

"The freight terminal structure will be of structural steel framework, thoroughly fireproofed and equipped with a 'dry pipe' sprinkler system, adequate ventilating equipment will be provided to insure comfort for employees in the basement.

"The street floor on Eighth Avenue has been so arranged that the entire frontage, except for the main entrances to the office building, can be occupied by a bank, stores, shops, or for allied purposes."

The witness resumed his testimony as follows:

The above figures read from the Port Authority Annual Report for 1930, were not compiled under my supervision, but were prepared by Mr. Evans under the supervision of the Chief Engineer. This was not contemplated to be the last or only Inland Terminal to serve Manhattan. Negotiations with the railroads contemplated three of these, two more to be built when the railroads wanted them built. The Board will find in the original joint report, the so-called Red Book, maps showing zone districts and numerous terminals.

These were prepared by my department. As originally contemplated in the studies of the Bi-State Commission and indicated in the joint report, I think we had in mind twelve of these Inland Terminals, each in a zone of approximately equal freight density. Extending

from 59th Street we had sliced Manhattan into equal zones and had planned a station in each, not equal geographic zones but

equal freight density zones.

The idea of providing Inland Terminal throughout the Port District has not been abandoned by me or my staff or the Commission. We have had in mind the development of such facilities in these outlying points whenever the transportation needs indicated it was necessary or desirable, and when it could be economically practicable or economically practicably financed and carried out. As a matter of fact we have in the last two years conducted a rather exhaustive transportation survey in Northern New Jersey, in the Newark territory, in which we have gone through the same preliminary clocking of truck movements and freight car movements and quantities of freight in the local freight stations that we did for this Manhattan study; the data on that Newark freight transportation study is in process of analysis now in our Bureau of Commerce which is under my general supervision. We have in mind there that it may be quite possible in the near future to consider the erection of such a union facility in that territory, likewise in other sections of the Metropolitan area. Of course, Manhattan Island is different from other sections, it is not served by rail, and in many of these other sections there are to some extent union facilities to-day, whereas there are none in Manhattan.

There are no pier stations on the New Jersey side, but there are many New Jersey shippers who to-day truck to Manhattan by the tunnel and by ferries to reach the union inland freight station and pier stations, and there are others who truck from Brooklyn and Queens, because the improved service that is avail-

able today out of this union facility makes it better for them.

It was never expected that Inland Terminal No. 1 would take care of all the less-than-carload freight on Manhattan Island; it was contemplated it would take care of a third of the less-than-carload freight south of 59th Street on Manhattan. Since it was planned, the business depression has caused L. C. L. freight on Manhattan Island to decline very substantially so that this station today probably has a capacity for almost half of the total L. C. L. on. Manhattan. My impression is that if you leave out perishables and bulk material such as coal, oil, and such things which were never contemplated to be handled in this terminal, that L. C. L. freight on Manhattan probably does not run over 900,000 or 1,000,000 tons a year.

It was not contemplated when my staff and I planned this Inland Terminal, that the pier stations would be at once removed from the waterfront piers by reason of this one terminal. The reason was that this whole transportation problem in the Port of New York so far as the railroads are concerned, all fits in together; you cannot take any one fragment and cut it off from the rest of the railroad trunk and say, "Well, we are going to solve that portion of the railroad problem by itself." In tackling this question of service to Manhattan, we had in mind, and still have in mind, drying up the use

of these railroad pier stations as time goes on.

Now there are three general types of freight handled on 892 railroad pier stations, one of which is the L. C. L., or package freight, which we propose to move inland to these inland terminals; another is the so-called carload type of freight which lends to store-door delivery by motor truck from the Jersey side. That system means in general that the railroad cars instead of being put on a car float and towed across the river to those pier stations, would be placed on team tracks, that is, tracks with roadways alongside of them on the Jersey side and the freight unloaded into motor trucks over there, and the trucks would come across the river instead of the freight cars, and go direct to the merchant's store door or place of business, wherever the freight should go. That saves the rehandling at the pier stations which is much more cumbersome and expensive handling, because it is not possible at a railroad pier station to back a truck up to a car door. The car lies offside on a pier station, on a car float which bobs up and down with the tide, and sometimes, with sleet and ice and driftwood, you cannot get that car float in close to the door, and you cannot get the truck body up against the car on that boat, so the freight has to be hauled off by hand truck and taken down gangways or up gangways on to the pier. There it is put on the floor, and when later on the merchant comes down, he has to lift this freight off the floor of the pier and put it on his truck body, raising it from 31/2 to 4 feet, and that requires a great deal of extra labor. In connection with that one item of move-

ment alone, lifting the freight from the floor of these piers up to the level of the truck, there has developed in this port over a period of years a rather difficult labor situation, having to do with what we call loading on piers. The group of men that hang around the entrance to each of these piers sort of have a little monopoly on that activity and when a truck comes down for freight, even though there may be a driver and a helper on the truck, these men at the entrance to the pier insist that they be hired to lift this freight up to the truck, and that adds to the expense of that operation. That would all be eliminated under a store-door delivery of car door freight, because the truck would back up to the car door and the driver and the loader would unload as everywhere else in the United States, and that would take care of the second item.

The third item is the perishable food and dairy products, and things of that kind that move in the summertime under refrigeration, and which over a long period of years have become concentrated in our market district on the lower west side of Manhattan; the freight is more or less frozen there. It is frozen, that is, it is anthored to that area, because the jobbers who have their little market

stores and wholesale produce houses all around that area, clustered around these particular railroad piers, are all interconnected by a system of refrigerated brine pipes that run under the city streets just like gas and water mains, from central refrigerating plants that

pump this brine to the different dealers, and each has his own little refrigerated area or refrigerator, so to speak, in his place 394 of business. So this traffic will have to stay there because the trade is more or less anchored there and we don't contemplate handling that traffic through inland stations or by store-door deliv-But we do contemplate consolidating it from all railroads on to a limited group of three or four of the nearest piers to that area of the city. No matter who owns those piers today, we would say those piers should be a union produce terminal to which any road that has carloads of perishables can float those cars and have them handled by a union terminal force. But all the rest, the store-door delivery and the L. C. L. freight, can gradually be removed from these piers and the piers restored to the city for leasing to steamship companies as their various leases expire. That is our general program on Manhattan. It is most decidedly contemplated that ultimately in the effectuation of the Comprehensive Plan, there will be a substantial reduction in the use of the waterfront on the Hudson River for railroad purposes.

In response to your question whether the work of my department is confined entirely to the physical railroads and their operations; my answer is that we are charged with other duties which have to do with the matter of the steamship operation in and out of the Port, and other methods of transportation and terminal facilities. We feel that we have a general responsibility for improving transportation conditions generally through the Port, not only railroads highways, and steamships, but even studying air transport.

With reference to steamship facilities, my staff has considered the matter of the long piers to accommodate the big ocean liners like the Normandie and the Queen Mary; we have cooperated with the City of New York and the Dock Commissioner in that field So far as my activities with the Dock Commissioner are concerned. I think that we think alike on these matters. We discuss them to gether at numerous conferences and we cooperate with them when he has matters to be developed to passing before the Army Engineer regarding the movement of harbor liners, so that he can build his new piers or berthing facilities.

We have studied the need for channel deepening and channel wideling in various sections of the Port, pursuant to a specific mandate to us in the Comprehensive Plan that we should urge upon the appropriate Federal authorities the improvement of channels, and we have on our own initiative and on representations made to us by the stemship and tow boat interests and others, urged that improvement are needed in certain of the channels. We investigated the conditions, and we have made certain field surveys, we investigated potential traffic—how much is going on the waterway, the depth of the

water-and have appeared at numerous hearings. I imagine we were before the Army Engineers, oh, once every two weeks throughout the year, twenty-five times a year, on one channel matter or another, urging the widening or deepening or something that would improve water transportation in the Port.

With regard to the statutory language requiring coordination of all the terminal and transportation facilities in the Port district a picture of the processes that are being followed by the Port Authority through me and my staff to achieve ultimate

coordination is a rather lengthy story.

The original Comprehensive Plan was factually a railroad plan, and so a great deal of our activity has been toward coordinating and improving the railroad terminal facilities, but we have also gone after the highway problem and the waterway problem. With regard to the railways, I have described rather fully the Manhattan situation. The principal additional features we have studied and tried to work out with the railroads were for a consolidation of all their marine activities in the harbor. At the present time each railroad operates its own independent fleet or navy of tugs, carfloats, lighters, barges, floating derricks, ferry boats, in some cases, and these are used in delivering freight of that one railroad fanwise from its terminal on the Jersey side to several Hudson pier locations and industrial locations about the harbor within the so-called lighterage limits. These lighterage limits are rather far flung; they extend up the Hudson River to about 135th Street; they extend up the Harlem River to about 145th Street; they extend down the East River to Hell Gate, all the way down the Brooklyn shore to Bay Ridge, which is just below the Bush Terminal Company; then across the Staten Island shore down to below Stapleton to the Government Quarantine Station, around through Kill van Kull to the entrance to Newark Bay, approximately then up the Jersey shore again to the Hudson River opposite 135th Street.

The southerly lighterage limits are at Bergen Point at Bayonne, which is the entrance to Newark Bay. Now in a recent proceeding before the Interstate Commerce Commission brought by New Jersey interests supported by the Port Authority, the lighterage limits to the Jersey shore were extended beyond Bayonne to include Newark Bay and Port Newark and Elizabeth and down the Arthur Kills to Tottenville, to Perth Amboy on the Jersey side; so that means an extreme range of lighterage limits from 135th Street on the Hudson, down to Perth Amboy on the Jersey shore of fifteen, thirty to forty miles. Now, the railroad has to deliver its freight to any point along that waterfront that the shipper may require, and that is why they built up these independent fleets.

The Port Authority recognized there was a tremendous number of criss-cross movements, and began a study with the assent of the milroads and their cooperation. We made very exhaustive clockings of the movement of every individual tug and lighter in this harbor

for a test period of a week, of all the railroads and all the steamships, all the private industrial piers, etc., and we found a tremendous amount of overlapping and criss-cross movement. Lighter boats were moving side by side for different railroads and tugs of three different railroads were going all the way down to Bush Terminal with each other and each with one lighter in tow, and that lighter with only two carloads of freight on it, whereas the freight lighter

can handle ten or more carloads of freight.

We have had the cooperation of the railroads in making the fact-finding studies in almost every case, but there their cooperation has largely terminated, except in the case of the Inland Terminal. After we made this factual study of marine activities we then borrowed some experts from them, and we dispatched on paper all of those boats with the idea of doubling up, giving two lighters to the same tug if they were going to the same place and loading the lighters heavier at the terminals in Jersey, and we found tremendous savings, running into several millions of dollars. We submitted that study to the railroads in an effort to get them to cooperate by unifying or consolidating or pooling their marine activities and saving these millions of dollars in terminal expenses.

We have found that the policy of the railroads is to unify such activities only to a very slight degree, and usually as more or less forced

to do so by pressure of public agencies.

My department is cooperating with the Railroad Coordinator, Mr. Eastman, in this field. We have made a number of studies for him based on our records and data, and submitted our reports to him. His regional coordinators here in this district in the past have received these reports from us with apparently great pleasure, and have forwarded them to Mr. Eastman in Washington with very favorable comment. We are still cooperating with them and I hope that we will be able to obtain from him in time through the medium of the coordinators some real progress in bringing about some of these coordinating activities.

The Member. Well, what is your interest in this coordination of marine traffic? What is your interest in reducing or seeing to it that a tug that is owned by the Pennsylvania Railroad

should tow two barges or lighters instead of one?

The Witness. Because we were created by the two States to reduce terminal costs here in New York. The high terminal costs of operation of the railroads around this district reflect themselves in the high cost of living of the people living in this territory, and the two States feel that it is to their interest that the terminal costs should be reduced, and have established this agency to do the job, and it is a very thankless job. We keep plugging away to try to get the carriers to reduce their costs and we are more or less without authority to compel them to do it, except by the economic pressure we can put on them by making a study and showing them it will be to their own financial interests to perform certain of these consolidating operations.

The MEMBER. Well, is it true that in the first instance the reduction

of cost will inure entirely to the benefit of the railroads?

The Witness. You say in the first instance, yes; the first initial saving will be made to the railroads, but as the railroads save money those savings invariably reflect themselves over a period of time, or should, and under the I. C. C. Rate Case, usually in time works that way, they reflect themselves in all the railroad freight rates, for they are all predicated upon over-all cost.

The MEMBER. What is your ultimate objective about it; is it the

reduction of costs to the railroad?

The WITNESS. Our ultimate object is to reduce the cost of 400 living in the Port district and the cost of doing business, the cost of handling freight through the Port district. We are in competition with other ports along the coast for export and import trade, and they are doing everything they can to reduce their terminal costs by providing in the case of some of these ports like Baltimore, Boston, and Philadelphia, piers for steamships to dock at practically no expense to the steamship. We are in competition here in New York where we have high pier rentals for steamships, to get shippers to route the foreign trade of this country in and out through the different ports and give us our fair share of it, and we lose out as our terminal costs increase, because shippers go elsewhere; they find cheaper routes. Railroad rates from the interior of the country to the north Atlantic ports are generally cheaper to Baltimore, Philadephia, and Norfolk than they are to New York, and it is only by giving expedited service and good terminal handling that we are able to participate in that business and overcome the rate handicaps that those other ports enjoy. And that is our principal interest in this terminal problem, to reduce the terminal costs and get that trade.

Mr. Cohen. Mr. Wilson, you are familiar in a general way with the language of the Interstate Commerce Commission in the New York Harbor case; do you remember the phrases there which said

York and railroad facilities be unified, that it was essential that they be unified so as to reduce the expensive cost of operation at the Port of New York?

The WITNESS. Yes.

Mr. Cohen. And is it pursuant to those admonitions from the Interstate Commerce Commission that the Port Authority was created by the two States and you are now carrying out the aim to achieve that result?

The WITNESS. In a general way; yes.

At the time the Bi-State Commission was studying this local terminal problem in 1917 to 1920 most of our freight traffic on the highways was handled by horse-drawn equipment. The radius of activity of the horse is limited to what he can do, how far he can go in a day with a heavy load and return to the stables at night. That resulted in the development of a multiplicity of freight stations along the waterfront, each one within a short distance from where

the horse could haul to and from. There was not any material amount of long distance highway travel. The ferries were purely local facilities to serve the intercommunication needs of the communities local to the two sides of the Hudson River. As time went on, and after the World War, due to the impetus that the war gave to the automobile industry, both pleasure cars and motor trucks came into the field in increasing numbers. The old facilities for horsedrawn equipment, the old ferry boats and their smaller terminals, restricted and narrowed and cramped purchases, soon became filled and cluttered up with an ever-increasing swarm of motor vehicles

that backed up from these ferry terminals in lengthening lines, until it got so bad around here in 1925 that it was quite an 402 adventure to cross the Hudson River on a holiday and weekend and expect to get home the same night. The lines of cars waiting at these ferry terminals extended literally for miles and miles in many cases, and it took hours to get on these boats. Our own investigators and our own clocking men know these facts. I have seen them myself and we have clocked them many times.

These ferry boats did a large business, as much as they could with their limited facilities. It was a very profitable undertaking, and I imagine they paid off all their capital investment and liquidated their investment time and time again before the Port Authority

ever came into the picture.

I am trying to trace the development of this highway program and how it came about in a natural and evolutionary way. The movement of freight had claimed the Port Authority's attention up to about 1924, but then the growing pressure on our trans-Hudson highway facilities, which were the ferries, became so great that it was beginning to interfere seriously with the movement of a good deal of our freight; these ferry terminals are on the same marginal street along the waterfront that the railroad pier stations are on, and when you pile the ferry congestion on top of the pier station congestion, that street practically becomes impassable, and just becomes a parking lot instead of a highway. There are photographs in the Red Book which indicate the congestion-photographs of a long line of trucks

waiting at the pier stations. So that finally a conference was called and the Port Au-403 thority was asked by the two Governors to investigate this highway condition because we had concentrated up to that time mostly on freight. We set up a staff for that purpose, we were given some special funds to provide that extra staff, and we studied this whole highway problem along the Hudson River and along the Arthur Kill and the Kill van Kull Rivers between New Jersey and New York, and we found a very definite need for additional facili-. The total highway traffic across the river, the interstate line, had practically doubled from 1915 to 1925; increased 150%, from five million to around twelve and a half million per year; and from 1925 to 1935 it has doubled again from fifteen million to thirty million. So that it was a gigantic problem that had to be faced in

big way. We found in our staff investigations that in addition to certain physical handicaps, there were financial handicaps in trying to improve facilities of this magnitude. It was a relatively simple or simpler task to bridge and tunnel the Harlem River or the East River because they were narrow streams and had good rock bottoms for foundations and piers, but the Hudson River was a mile wide and was the bed of an old canon, filled with silt, three or four or five hundred feet in depth, and the actual engineering difficulties led to gigantic costs for a single facility. It would run up some thirty, forty, or fifty million dollars to provide one crossing, and private capital up to that time had not been able to do it for highway pur-

poses, although there had been in existence charters for constructing highway crossings over the Hudson River practically ever since the Civil War. There were two charters granted by the Legislatures for constructing highway facilities across the Hudson River along about 1866 or 1867; then there was the famous Federal Charter granted to the North River Bridge Company for a bridge across the Hudson, first at 23rd, later at 57th Street. That charter was granted in 1890, and forty-five years have elapsed and that company has been unable to finance and carry out the program. So that just as the provision of highway facilities generally is necessary to take care of the needs of the local population, so we studied the provision of extension of those highway facilities with the idea of connecting up the highway system of New

Before that time, over the East River, from the easterly side of Manhattan Island, when the Port Authority began, there were in existence four bridges which constituted part of the highway system of the City of New York. They were the Brooklyn Bridge, Manhattan Bridge, Williamsburg Bridge, and Queensboro Bridge. But there were no bridges connecting New York City with the New Jersey mainland. There was no vehicular highway of any kind

Jersey with the highway system of New York, and make it a continuous highway in this Metropolitan district. It was submitted to the

Legislature, this rather comprehensive study.

between Manhattan Island or Staten Island and New Jersey before the Holland Tunnel was opened. The Holland Tunnel was the first vehicular connection between New York and New Jersey within the Port district. It is my information as a public

fact, that the Holland Tunnel was financed, as was the Camden Bridge, by New Jersey by means of a bond issue, and it appears from the statute passed by referendum vote that the bonds of the State of New Jersey were to be secured by the tolls and revenues derived from those two enterprises. The State of New York appropriated its \$25,000,000 for the Holland Tunnel out of the annual appropriation.

In the initial projects of Port Authority, to-wit: the Goethals Bridge and the Outerbridge Crossing between Staten Island and New Jersey, with reference to the economic practicability of the steps, we had no credit with which to get started; and in order to

provide underlying equities or a cushion on which our bonds could be sold the States agreed to advance in the nature of a second lien on the facility, roughly 25% of the cost. The Port Authority was to sell bonds to the public for 75% of the cost. After the public had been paid back on its bonds the Port Authority was to pay back to the States its 25% advance, all out of toll earnings from the facilities. That is the initial plan. That same plan was followed in the case of the George Washington Bridge and the Bayonne Bridge. In the case of the George Washington Bridge the States advanced about \$10,000,000.00, that is, about 25% of its cost. The exact figures are in the Stipulation of Facts.

In the case of the Holland Tunnel, however, which had been built by these New Jersey bond issues and by a direct appropriation in

New York, when the Port Authority took it over from the 406 States for the purpose of pooling all the vehicular interstate crossings in the Port District, under a dually announced State policy, it became necessary to satisfy the sinking fund requirements of the New Jersey bonds which constituted a trust agreement with the bondholders. Therefore the Port Authority sold a bond issue for the entire cost, to date, of the Holland Tunnel, which is \$50,000,000.00, and paid each State half of it, thus liquidating 100 cents on the dollar the indebtedness of both States for that facility. In the case of the Inland Terminal there was no cushion provided by anybody and the Port Authority sold all the bonds needed for the full one hundred per cent investment. Neither State appropriated any funds for the construction of the Commerce Building housing Inland Terminal No. 1.

In planning street and highway approaches to the Port Authority tunnels and bridges the Port Authority has connected them with the highways. In the case of the George Washington Bridge on the New York side the Port Authority had to acquire about four solid blocks of Manhattan property which was fully developed and had high-class apartment houses on it; and it built an elaborate system of approach ramps down to Riverside Drive, and is now building a vehicular tunnel under Washington Heights, carrying the New York approaches of the bridge clear over to the east side of Manhattan Island where it will connect with the avenues on the east side of the Island, and thus making fanwise distribution to Riverside Drive for local streets on the west side of the Island and north and

south on the east side of the Island. The City of New York is not contributing to these highway connections and expenses. The Port Authority is paying for all of those improvements on Washington Heights. The ramps down to Riverside Drive have been dedicated to the City, because they are also used by local traffic as well as bridge traffic since they have been completed. The tunnel under Fort Washington Heights which is not yet completed has not yet been turned over to the City. I do not say the plan is to turn it over to the City, I do not say that it will be desirable to turn it over to the City, but it will be used by bridge traffic, however.

On the Jersey side we cooperated with the State Highway Commission, and a very elaborate system of highway approaches was built, planned by our terminal engineers and partly financed by the Port Authority, and constructed by the State Highway Commission according to our plans which provided for the merging of three State routes in the vicinity of the bridges, Routes 1, 4, and 6, in a system of so-called flying junctions, which again get away from any cross-over movements at all or any graded or conflicting currents of traffic.

In planning these highway connections we were influenced by the lesson of the Brooklyn Bridge and all of those facilities. We found that the congestion of those restricted approaches which, as I said previously, were planned in the horse and buggy days when we did not have automobiles, are a limiting factor to the capacity of the

bridge itself, and we attempted to provide approach facilities which would allow traffic to flow in and out and develop the

full maximum capacity of the bridge and tunnel structure. At the Holland Tunnel on the New York side an entire square block of property was taken for development of an entrance plaza and a larger portion of the block immediately south of Canal Street on Varick Street was taken for an exit plaza. These were acquired by the Tunnel Commissions which built the Holland Tunnel with State funds, and they are operated as approach facilities for the tunnel.

On the New Jersey side of the George Washington Bridge the bridge approaches graduate into the State Highway system in an imperceptible degree. The bridge approaches run back to forkings of Routes 4 and 6 close to a mile from the end of the bridge before the different State routes fan out on their own. At the Jersey end of the Holland Tunnel, the Commissions widened two parallel streets, 12th and 14th Streets and a crossover street, going back a distance of four blocks or about a quarter of a mile from the end of the tunnel.

In the case of the Midtown Tunnel even more elaborate approaches are being built. The Midtown Tunnel comes into Manhattan at 39th Street and Tenth Avenue, immediately east of Tenth Avenue. In the block between Ninth and Tenth Avenues the Port Authority had acquired a north and south strip of property from 34th to 42nd Streets, a distance of about half a mile, and is building a new street. That entire district, roughly 100 feet wide, gets smaller at

the end as the traffic requirements are less. That is for the first tube of this tunnel. Now, when the second tube is built alongside at a later date a similar new street will be constructed north and south between Eleventh and Tenth Avenues to serve the other tube.

On the New Jersey side of the Midtown Tunnel a great deal of property has been acquired in Weehawken and Union City for developing a series of ramps up the face of the Palisades and a new depressed high speed route through the top of the Palisades that will

not conflict with any of the north and south streets in that section of New Jersey, and that will go through the Palisades and will connect with the Jersey main highway route out on the Hackensack Meadows. Likewise, in the case of the Staten Island Bridges similar approaches were built. Traffic down there is much lighter. The bridge at Bayonne connects with Hudson Boulevard and one of the other streets of Bayonne and is carried over a whole series of railroad yards and terminal waterfront streets, there to land us in a section of the city that is less congested.

Similarly on the Staten Island end of the Bayonne Bridge a large abandoned quarry was obtained, partly filled in and a circular system of traffic laid out there. That was done also in the case of the Goethals Bridge at Howland Hook and in the case of Outerbridge Crossing at Tottenville, where large circular plazas were built to facilitate a right-hand movement of the traffic. On the Jersey side for the Goethals Bridge, a similar plaza area was developed, and

again in the case of the Outerbridge Crossing. So a great deal
410 of work has been given to the approach facilities of these
bridges, and to properly connect them to the highway systems
so that they can be developed to the full capacity of these crossings.

The Statutory Comprehensive Plan says that the Port Authority shall cooperate with the State Highway Commissioners of each State so that trunk line highways, as and when laid out by each State, shall fit into the Comprehensive Plan. That cooperation has been carried

on. It is in the charge of the Chief Engineer.

The Chief Engineer prepares plans, has a conference with the State officials on each side of the river and obtains the approval of the local governmental authorities for these plans before construction proceeds. The approaches to the new Midtown Hudson Tunnel run through three municipalities on the Jersey side, Weehawken, Union City, and North Bergen, and approaches have been laid out in cooperation with the municipal officials, the Port Authority paying for them. The Port Authority has not received any advances or second lien moneys or cushions from the State for the Midtown Tunnel.

Recurring to the historical development of the features of the Comprehensive Plan to the point where the two Governors gave directions after studying the highway problem, the outcome of the studies made at their request was the report which is included in one of our annual reports, recommending an uptown bridge across the Hudson River from Manhattan to New Jersey, north of 59th Street

Street, and one or more additional tunnels south of 59th Street.

411 As a result of this report further conferences were held with
the State officials resulting in legislation directing the Port
Authority to investigate the possibilities of constructing one or more
bridges, raising its own funds for this purpose, and the States appropriated moneys for traffic surveys and engineering surveys and design,
so that we could make up accurate estimates of cost. Out of that
grew the first bridge project in 1925 and 1926 for the Outerbridge

Crossing at the lower end of Staten Island, and the Goethals Bridge at the northwest corner of Staten Island. When those were under way and financed by the Port Authority with the aid of this 25 per cent cushion, further studies were undertaken at the request of the two States with respect to a bridge from Bayonne to Staten Island, and this originally recommended bridge uptown in Manhattan. This resulted in the same orderly process of traffic and engineering problems and reports and recommendations, estimates of revenues, expenses, and that led to the construction of these two facilities in the same orderly process. The construction of these facilities and the development of the plans were under the Chief Engineer; after the bridges had been started all, traffic work was turned over to my department. I knew the character of the work before it was turned over to my department, from the records which have been turned over to us.

Before engaging upon the construction of these facilities, we made traffic studies. Each of the crossings involved substantially the same

kind of a traffic survey, so a description of one will apply to all unless there are some special questions. The first step is

a very careful clocking of the existing traffic crossing neighboring ferries and using neighboring highway routes. This involved patting a large force of investigators and inspectors in the field, stopping this traffic on certain test days at certain test hours at convenient points, and questioning the individual drivers as to where they are coming from and where they are going to, so that we can determine travel habits and routes and where the traffic comes from,

what districts it is going to.

In the case of the two earlier bridges, the Outerbridge Crossing and the Goethals Bridge, whose traffic studies were started back in 1924 and progressed over a period of several years, but we have found it has been necessary in that work to make it practically continuous. We have a small staff of a few men who keep current records of all bridges and ferries throughout the Port District, and about once every five years we make a so-called origin and destination clocking to see what changes in travel habits have occurred during that five-year period, due to the development of new suburban areas or provision for new crossings or the abandonment of old crossings, or the like. So, having made these origin and destination clockings and having obtained statistical data on the number of people using certain facilities over a period of years, we calculated trend curves as to how the business is growing and project those curves into the future, based on certain formulae and processes that the statisticians

and analysts have worked out from their experience over a long period of years. We allow certain factors to come in there—we call them "step-up"—that occur whenever you open a new facility. There is always a certain jump in the total volume of traffic when you open a new facility. It seems like you were pulling a plug and releasing some pent-up energy. People who have not traveled in the past because of the congestion and delays find a

new facility and they surge across it. That step-up runs as high in some instances as thirty and forty per cent on our facilities. As a matter of fact, the George Washington Bridge opened up an entirely new area of residences in Bergen County and that section of New Jersey, which makes for traffic. It has made the outlying areas more accessible to the heart of the district and thereby attracted people into those areas, outside of the congested sections of Manhattan.

Mr. Cohen. Now I call your attention to Section 6 of the Legislation, dealing with the Comprehensive Plan, on page 43 of the Port Authority Statute Book (Stipulation Exhibit E): "The determination of the exact location, system, and character of each of the said tunnels, bridges, belt lines, approaches, classification yards, warehouses, terminals, or other improvements shall be made by the Port Authority after public hearings and further study, but in general the location thereof shall be as indicated upon said map, and as herein described." Now what was the technique or the process employed by the Port Authority, in which you participated, by which the studies and these public hearings are held before the official determination of the exact location, system, and character of

414 any part of the Comprehensive Plan is made by the Port Authority? Are public hearings held before such operations?

The WITNESS. Well, the general location of a facility is determined, first of all, by traffic needs, based on our traffic elockings, by determining routes of flow and where the various heaviest streams of traffic that converge on these waterways are apparently seeking And having determined a zone, a focal point where to cross them. there seems to be need of an improved crossing, then that location is preliminarily determined by the engineers, based on the physical geography and topography and sub-surface conditions, such as rocks and faults and strata, etc. And when those two have been made, when the engineers have completed their studies and arrived at a tentative exact location, then the public hearing that Mr. Cohen refers to are held to give everybody else, the public and any other people, agencies of the Government, etc., opportunity to comment on this preliminary and tentative location. In some cases some modifications are made, but, generally speaking, the work has been so thorough that there have been no substantial changes in the locations for these crossings.

(The witness continued his testimony as follows:)

It is part of the work of my department to bring together the statistics of traffic and potential revenues which furnish the basis for investors in Port Authority bonds and for their belief that the revenues will adequately support the operating costs, sinking fund

requirements, and interest requirements. That work is done
415 by our Bureau of Commerce, under me. The technique or
process by which my staff submits this information to investors is as follows: Having made traffic clockings and having applied our formulas to that data, we arrive at an estimated volume

of traffic which would use the new facilities, divided into classes, viz, buses, trucks, and pleasure cars. Then, by applying our best judgment as to what average toll rate we can hope to collect on those facilities without diverting traffic too much to other facilities, we apply those toll rates to the estimated volume of traffic and arrive at a certain annual income for the new facility. This is applied against the engineers' estimate of the cost of construction, and we deduct our own estimates of the cost of operating the facilitythat is, the police, toll collectors, and the maintenance men-and we arrive then at a net revenue to apply against the debt charges. Meanwhile conferences are going on between the general officers and bankers for the purpose of estimating the rates of interest we expect to pay upon the sale of our securities. The best estimates are applied then to the engineers' estimated capital cost in getting at our debt charges, and rather complete financial statements are prepared showing the life of the bond issue, what the earnings from the bridge will be based on, the traffic and the toll rates less the operating expenses, giving a net figure to apply against the bonds outstanding in each of those years. And those statements are made available to the various banking interests who may be interested in bidding for

the securities which the Port Authority then offers for sale on bids. The bonds are sold, the proceeds go into the treas-

ury, and are used to defray the cost of production.

Our estimate with reference to the Staten Island bridges did not materialize in actual revenues. Those bridges are now covering all of their operating and maintenance expenses, interest charges, and about half of their debt service charges. The remainder is taken from the general reserve fund.

The George Washington Bridge is paying all of its operating expenses, maintenance expenses, interest charges, and in addition

is setting aside a surplus for amortization.

The Inland Terminal at the present time is earning all of its operating and maintenance expenses, interest charges, and is also setting aside a surplus for amortization. That was financed on a rental program. At the present time the building is now about 95 per cent rented, so that it is up to its full rental program in about three years instead of five.

The Holland Tunnel has operated to produce a surplus right along, and it still does, that part of the surplus going back into the general reserve and making up for what has to be paid to meet the deficit on other enterprises, or other projects of the Port

Authority.

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With reference to the Midtown Tunnel, the two tubes were planned to cost \$75,000,000.00. When the depression came the Port Authority was unable to go forward with those two tubes since we were not able to sell our bonds. In the first instance the Port Authority obtained the money with which to build the Midtown Tunnel in the form of a credit from the Federal Government; it drew down the money as it needed it.

Mr. Cohen. Now, taking the so-called belt lines that are contained in the statutory Comprehensive Plan now forming part of the Compact, I wish you would take your finger and indicate to his Honor the lines of the so-called Belt Line No. 1. (The witness

indicated on the map.)

The WITNESS. Belt Line No. 1 is practically the keynote of the proposed belt line system for the purpose of connecting up the railroads on the New York and New Jersey side of the port. It starts up in the Bronx, and has a connection with the New York Central and New Haven Railroads in the vicinity of the Port Morrisania yards, and it follows the route of the New York Central Railroad over the Hell Gate Bridge down to Queens, past Fresh Pond Junction and East New York; then following the tracks of the Long Island Railroad, the Bay Ridge Division, it goes to Bay Ridge-to the Bush Terminal on the South Brooklyn waterfront. Then by a proposed tunnel it goes under New York Bay and comes out on the Greenville section of Jersey City. In Jersey City the connections are with the facilities of the Lehigh Valley and the Pennsylvania Railroads, thence west across Newark Bay to Oak Island Junction, and south along the Central Railroad of New Jersey route to the vicinity of Elizabeth, and thence into Staten Island along the north shore of Staten Island, following the B. & O. Staten Island Rapid Transit route to St. George. Another branch of the belt line turns north at Greenville, and runs north through Jersey City, partly following existing rail routes, partly new construction, to a connection with the north-

erly group of railroads, Lackawanna, Erie and West Shore on 418 the Secaucus Meadows. The principal feature of this line of this new construction is the proposed tunnel under the Upper Bay. That is one of the proposed Belt Lines of the statutory Comprehensive Plan. It is not yet in operation. The rail facilities on the two

ends are in operation, but not the tunnel as yet.

(The witness continued his testimony as follows:)

My Department, with a view to effectuating the Comprehensive Plan as rapidly as economically practicable with regard to the Belt Lines, first made the studies of Belt Line No. 13 which I have previously referred to. Then we made a study of this Belt Line No. 1 project to see if we could finance and divide the Upper Bay to connect the two railroad systems on the two sides of the Port. That is a what is called the Greenville-Bay Ridge Tunnel route. route approximately four and a half miles long passing under the main ship channel of the Port, and lying a large part of the way in shallow/water on the flats on the Jersey side. We made very care ful studies of that. Our engineers estimated costs. We had the cooperation of the railroads in making available to us engineering studies which they had made. We collected railroad data on the interexchange freight that is moving today by car float between these different railroad terminals that are shown in red on the map on the Jersey side, and the various railroad points on the New York side, principally the terminals at Bay Ridge, Brooklyn, Long Island City, and Oak Point in the Bronx. Those are the principal terminals to which the Jersey railroads float inter-change cars. The difference between inter-change cars and local harbor car floatage is that the inter-change traffic is put on the float at one end of the float haul and is taken off at the other, whereas the pier station floats its cars, that is, the cars are put on the floats in Jersey and remain on the floats at destination, and then go back on the same floats to the rail terminals.

Now, having assembled this data from the different railroads as to the volume of traffic now moving, and having obtained it over a period of years to determine the trend, we estimated the volume, the number of cars by the tonnage that would use such a tunnel if built. And applying that in the same manner against our engineering cost, and actually calculating with the aid of the railroads, the present cost to the carriers of floating this much traffic, and then, as estimated, the cost of railing it through the tunnel, we arrive at a difference between the present and the proposed method of railroad operation that gave an indicated saving of \$5,000,000.00, which, applied to an estimated cost of construction of \$50,000,000.00 in round figures, gave us an estimated 10 per cent return on the facility. That seemed to us a reasonable basis on which to open negotiations with the carriers, because this was not like a highway, tunnel, or bridge. You could not build a railroad tunnel and put a toll gate at the end and charge every car that went through it 50 cents. You would

have to have a contract with the railroads that they would use it and route their whole trains through it and run it in connection with their regular service schedules on each side. When we came to that we found the railroads reluctant to do that. They challenged the figures that we had prepared, and that led to a series of conferences with the railroad officials. They appointed engineers and operating men for further studies, and a study of that kind, a joint study, is now going on at the present time, under my general supervision on behalf of the Port Authority, to test those old figures in the light of changes that have taken place in recent years due to the depression.

There is no way that I can see that the Greenville-Bay Ridge Tunnel can be provided unless the railroads are willing to use it, before they are satisfied that it will be a matter of economy to them on the

carriage of freight across the harbor.

The Port Authority has never contemplated any plan whereby it would take over any of these railroads now embraced in the proposed belt line. We feel that the operation of these facilities should be left in the hands of the local railroad managers. They know how to run them. The Inland Terminal itself is being operated by the railroads by a joint labor force. The Port Authority is not in the railroad business at any point in the harbor. All that it undertakes to do is to take existing facilities, as it did in Belt Line No. 13,

and by the process of persuasion or by building additional connecting links and by adding such new facilities as are necessary to round out that whole property, make them into a coordinated whole, as required by the statute. I think that is a fair statement.

The Inland Terminal fits into the Comprehensive Plan in the following way: The Comprehensive Plan for Manhattan Service contemplates giving up the pier stations and moving the railroad activities into the interior of the island. That has to be done in three steps: first, by providing inland dumps for L. C. L. package freight, which is what these inland terminals are for; second, by the carload delivery—a store delivery service on carload freight; and, third, Union Terminals for perishable freight on pier stations.

Section 4 of the Comprehensive Plan under the heading, "Manhattan Service" says: "The Island of Manhattan to be connected with New Jersey by bridge or tunnel or both, and freight destined to and from Manhattan to be carried underground so far as practicable by such system, automatic, electric, as is hereinafter described, or otherwise, as will furnish the most expeditious, economical, and prac-* * Suitable markets, Union ticable transportation of freight. Inland Terminal stations and warehouses to be laid out at points most convenient to the homes and industries upon the Island." It has not been found practicable to do that service by the automatic electric system described. It has been found decidedly practicable to use the motor truck, together with tunnels and bridges across the Hudson to achieve the same result. That was what led to treating the Inland Terminal as part of the same system of service described in Section 4 of the Comprehensive Plan, and that determination was ' made after public hearings and after study by the Port Authority in accordance with the statute.

I have now covered all construction projects which we have so far constructed or have under construction at the present time, meaning by the word "projects" not merely functions of the Port Authority, but things that are to be brought into being like the Inland Terminal, the Midtown Tunnel, etc. However, if "projects" include all matters we have studied and are studying with the expectation that they may be some day brought into being, when economically practicable, I have not covered them all. The Comprehensive Plan contemplated, and the Bi-State Commission's report indicated, that the Comprehensive Plan would take a very long time to be effectuated. All Port Authority structures are built looking well into the future, in contemplation of increased demands for service, and not only for today.

For example, the George Washington Bridge has an estimated traffic capacity of 30,000,000 vehicles a year, and we handled last year about six and a half million, so we have allowed there for growth in the future. As a matter of fact we have not completed the bridge. The center section of the roadway is as yet unpaved because we do not need it at this time. We have ample capacity now without that.

Later on that will be paved and it will increase the capacity. Then there is a provision made in the steel upper structures, sufficient steel has been added to give us sufficient strength to add a lower deck on the bridge for rapid transit; when and if the development of rapid transit in the northern section of New Jersey requires such a facility

across the river it can be provided in that way at much less expense than providing a brand new bridge just for rapid tran-The approaches I have described are also laid out looking well into the future. The moneys, therefore, which the Port Authority raises on its bonds must be sufficient to provide approaches and facilities not merely adequate for today's service, but, for service for a long time to come, as it may be augmented. And except for the advances and appropriations made by the States and the turning over the revenues from the Holland Tunnel, all these moneys must be raised from the Port Authority's own securities, unsupported by the credit of the States or by any taxing power. Hence, these facilities are not built as the City of New York built its bridges across the East River, receiving the moneys out of appropriations from the taxes of the community, or as the State of New York has built other bridges across the Hudson. We have no way of raising tax money. Applying that especially to the Inland Terminal, studies were made under my general supervision to see to it that the prospective revenues from the entire building would be adequate ultimately not merely to pay for the Inland Terminal but also to pay for the entire land and building out of the bonds. The States supplied no funds whatever by way of backlog or cushion for that enterprise. It is the simple fact it never would have existed today if it were not for the fact of the revenues derivable from the upper stories above the rail terminal.

The Bush Terminals are on the south Brooklyn waterfront about six miles on an air line from Inland Terminal No. 1. [The witness indicated the location on a map.] There is a direct rail connection from it to the Long Island Railroad, but it is reached from New Jersey by car float.

With regard to car floats there is a relationship which the ice and fog problems of the Port bear to the work that the staff of the Port Authority has had to do in effectuating the Comprehensive Plan. The movement of freight about this harbor by water, of course, is interfered with whenever there is any physical condition such as fog or ice that interferes with the movement of car floats. Our experience and the records kept by the Federal government on fog conditions show that on the average, year in and year out, we can count on their being serious fog delays about 5 per cent of the time. When that occurs the car floats do not move or move only in a very limited way, with the result that freight piles up in cars at the Jersey terminals of the railroads and backs up at the stations in Brooklyn,

Queens, and Manhattan, causing congestion and added expense,

Likewise with ice; ice conditions start in January each year and continue well into March. The ice that forms in the various tidal estuaries of the port—you can see from the map, from the blue areas—how much water there is in the port—this ice forms in these quiet waters and up the Hudson River above the George Washington Bridge where you get most of it and that comes down with the tides as it is broken up by the tides and winds, and the prevailing westerly winds drive that ice into the slips and the car float bridges on the

east side of the port along the Manhattan waterfront and it is blown around the lower end of Manhattan Island and

carried by the tide up the East River and packed into the slips and car float bridges along the Brooklyn and Queens shore, until at times it is impossible to move these car floats and in fact any kind of small harbor craft, lighters, coal barges, oil barges for supplying the various local terminals all out through the residential section of Westchester County to the north of Manhattan and out through Long Island, Nassau, and Suffolk Counties, up through Newark Bay, the Hackensack and Passaic Rivers. Most of the fuel for the suburban homes and for the gasoline filling stations throughout this area is distributed by water from the major coal terminals of the railroads which are located in Jersey City and down in the Amboy section of New Jersey. The cars are dumped in the barges and those barges towed up to unloading points on Manhattan Island up into Westchester, and then tracked short hauls to the homes. Oil is handled in the same way; fuel oil for home heating, and gasoline for the local filling stations is loaded onto tank barges along the Arthur Kill and in the Bayonne section at the big oil refineries and those barges are towed or in some cases proceed under their own power to similar waterfront terminals throughout this district.

There are times in these ice conditions when the railroad has to put two or three tugs behind a ferry boat and one ahead to get the boats into their slips. I personally have seen cases on the Hudson River where the ferries were approaching Manhattan, where the

ice was packed, piled in by the winds from the west. It has 426 been packed in there so dense that in one case I recall a passenger on one of these ferry boats jumped off into the river and walked ashore over the packed ice, slipping around until he was finally lassoed by a man with a rope and hauled onto a small tugboat.

Ice conditions at the present time are rather bad in the harbor. We are getting a great many calls at the Port Authority from these outlying points, where they can't get the coal barges and the oil barges in. We are getting calls for assistance in getting them some relief, to prevent fuel shortages.

While we have some ice conditions on our bridges we have none in the Holland Tunnel, of course—we never have had a time when that traffic was completely stopped. In fact, in the severe weather of the last two weeks, we have kept running practically normal. In fact, the facilities for crossing the river are, in many cases, the best part of the highway journey for most of these cars. We keep plows and men at work, and they keep the bridges well cleaned off, so that has provided a safety-valve for all the people on the east side of the port. Now they are no longer faced with shortages, not only of fuel, but of food.

We have had occasions in the past when there have been thousands of ears of foodstuffs, perishables, flour, et cetera, tied up on the Jersey shore, so that it was not possible to move it across the river

by car float.

There is a very decided advantage, in times like these, to those who drive motor vehicles, in coming through the Holland Tunnel or over

the George Washington Bridge, as compared with coming on 427 the ferry boats. They are not subject to any delay. They come across in a few minutes—three to six minutes; whereas the trip by ferry, under conditions such as these, may take anywhere up to an hour in fog conditions. The ferry boats have gone astray, and have ended up miles away from where they started, and trips of an hour or more under such conditions are the normal thing.

There used to be a good many ferries running across from Manhattan to Brooklyn and Queens. There were ferries from the Battery to Hamilton Avenue and to Atlantic Avenue, Brooklyn. There was a ferry across from the foot of Wall Street, to Fulton Street, and ferries at 23rd Street, 34th and 9th Streets. There may have been more. I do not think these ferries are still in operation. The Fulton and Wall Street ferry is definitely out of existence. The 34th Street ferry went out of existence a number of years ago.

I was educated as an engineer and I have spent 15 years studying this traffic problem generally. Also, I am charged with familiarizing myself, with the assistance of my staff, with all these conditions, not only here, but in other parts of the country. In my opinion, the normal effect of establishing a bridge over which motor vehicular traffic, truck and passenger, could go, as compared with the ferries, disregarding the ice and fog, is immediately to quicken up the whole tone of a district. It facilitates travel and transportation. It makes it easier for the people of the two sides of the river to do business

with each other. It promotes exchange of commodities. It broadens out the field of activity of stores which are able to make deliveries out in the suburbs, which they were formerly unable to do on account of the time factor. It unquestionably eliminates delays and it contributes in a very marked way, over a period of time, to the increasing prosperity of any district in which such an improved facility is located.

There has been a marked increase in the motor traffic through the Holland Tunnel over the last two or three years, particularly in the last year. In the last six months we have run over eight thousand motor trucks a day, compared to the earlier years, of only half of

them. These trucks are of all kinds. They are long distance, short distance, large corporations, individual trucks owned by single owners and drivers; trucks coming from the south, the Carolinas, Georgia—produce trucks coming from Michigan, Wisconsin, the middle west. There can, of course, be no question that there is economy in the operation of these trucks without delay compared with the great delay due to inability to cross a stream or body of water at a congested point. The longer the truck is on the road, the greater the expense. The driver, unless he is the owner-driver, which very few of them are, gets paid by the hour, and if they are out more than a certain length of time, eight or nine hours a day, they get time and a half for overtime, and all that adds to the expense of the operator of the truck without increasing his revenues any. He is paid so much a ton for the trip, regardless of the time it takes. We

have had a very great many instances of that kind in our discussions with truck drivers and truck operators in this district as to our facilities in competition with the ferries, where they have felt that possibly they could not afford to use the Holland Tunnel because the rate was 25 cents a vehicle more than the ferry, or more than by ferry. But we have been able to show them that by using the Tunnel, they were able to make a round trip and get the truck back to the barn so much sooner, that it would save them that much more, it would offset the extra cost of the tolls through the Holland Tunnel.

In the light of my knowledge and experience, I would say that the creation of these interstate crossings affects business and industry to the extent of improving the business and industry and making the operating costs lower than they would otherwise be, thus increasing their net revenues for whatever purpose is necessary to use those

earnings.

I do not know of any private businesses which have been supplanted by anything that the Port Authority has done in all of its history. The only thing I can think of is one small ferry down on the Staten Island shore which used to run across from Carteret about the middle of the west side of the island, mostly handling factory employees to oil industries; largely pedestrian traffic. That has gone out of business since the Staten Island bridges were opened, but it was on its way out of business prior to that and would unquestionably have gone out of business whether the Port Authority

bridges were built or not, due to the influence of the Jersey
430 State Highway System drying it up. There are ferries at each
end of the island anyway, and this ferry was kind of caught
in the middle, due to improved highway facilities, to automobiles;
and that ferry would serve a useful purpose in the days of horsedrawn vehicles operating locally in the Carteret area; but it no longer
performed a useful function among the automobiles after the horse
operations.

The congestion occurred prior to the establishment of these bridges and tunnels at the ferry terminals on both sides of the river in Manhattan. It was due to the buildings, to the intensity of the development of the surrounding property along the waterfront streets. It has not been possible—practically, at least, it has never been done by the city—to expand or enlarge any approaches to ferry terminals. They were just as they have always been, debouching right on a waterfront street without any special facilities for unscrambling the ferry traffic from the general pier traffic.

Of course, when the automobile came along, much bigger and many more of them, they would stand lined up waiting for these ferries, which have an intermittent service—not a continuous speed like a bridge or tunnel. And, with the boats sailing fifteen, twenty, thirty, or thirty-five minutes apart, these lines would build up and extend out into the streets, and, therefore, interfere with the movement of the city traffic north and south along the west side. In some cases, it would extend over in front of adjoining property.

pier stations, and cross streets, blocking the movement of 431 crosstown traffic, blocking the traffic going to and from the pier stations. Providing the tunnels and bridges has made it possible for a great deal of that traffic, particularly the more highspeed pleasure car and bus and long-distance truck, light delivery truck, to use these continuous speed facilities of the bridges and tunnels, and thus relieve the street congestion in the vicinity.

Mr. Cohen. I show you a photograph, and ask you if this is produced from your department as a photograph of trucks waiting to cross the Hoboken Ferry at Manhattan, and prior to the opening of the Holland Tunnel taken in 1999.

the Holland Tunnel, taken in 1920.

(The photograph referred to was passed to the witness.)

The Witness. Yes, I recognize that picture. That is a picture taken at Hoboken, looking west from the ferry terminal toward the interior of New Jersey, the Palisades showing in the background; and this is a line of trucks and horsedrawn equipment waiting to get on the Hoboken ferry at the point where this is taken, which is about six or seven blocks away from the ferry landing. The picture was taken in 1920 before the adoption of the Compact and the Comprehensive Plan.

(The photograph referred to was received in evidence and marked "Petitioner's Exhibit No. 1," and made a part of the record. This Exhibit is included in the record as a physical Exhibit.)

(A second photograph was passed to the witness and identified as a reproduction of photograph appearing on page 293

of the Joint Report, Stipulation Exhibit B.)

That photograph shows the situation of West Street around Houston Street on piers 40 and 41, and the traffic congestion in 1918. It was taken in Manhattan looking northwest. It shows the shed houses of the railroad piers and steamship piers and trucks standing out

in the street waiting their turn to get in and get freight. In some cases, either due to congestion on piers or congestion waiting to get in, the freight is unloaded out in the streets and piled on the streets so as to release the equipment.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 2" and made a part of this record. This

Exhibit is included in the record as a physical Exhibit.)

(A third photograph was passed to the witness. It was identified as a photograph taken in 1918 on pier No. 17 on Manhattan Island

around Barclay Street, for the Bi-State Commission.)

That photograph shows that at that time there was practically no automotive equipment. I think there were only two or three motor trucks visible in the picture in a total of possibly twenty, or only one pleasure car. Everything was horsedrawn. The same conditions obtained, of piling freight on the streets and helter-skelter parking

of trucks interfering with any through movement.

433 (The document referred to was received in evidence and marked "Petitioner's Exhibit No. 3" and made a part of this record. This exhibit is included in the record as a physical exhibit.)

(A fourth photograph was passed to the witness and identified as taken on Pier 23, south of Beach Street, between Beach and Duane

Streets.)

Pier 23 is the New York Central Railroad Freight Station, about a half mile south of the Holland Tunnel on the west side of Manhattan Island, and south of Inland Terminal No. 1, which is at 14th Street.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 4," and made a part of this record. This exhibit is included in the record as a physical exhibit.)

(A fifth photograph was passed to the witness and identified in

the photograph as Pier 23, taken in 1918 from another view.)

That is another view of the same pier, but it is taken a little further north, and a little further away to give a larger field. It shows the same lineup of equipment which is congesting the street.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 5," and made a part of this record. This exhibit is included in the record as a physical exhibit.)

434 Mr. Cohen. I should like to call your attention at this point to certain paragraphs in the Red Book, the joint report (Stipulation Exhibit B), appearing in the summary, which we said would be about all that you would need to read on this.

"Adequate reorganization of the waterfront as a whole, like adequate reorganization of the railroad systems, can be brought about only by large scale operations under the direction of a central

authority working from a Comprehensive Plan."

On page 31: "Highway accessibility—of the three forms of accessibility, rail, water, and highway, essential to every successful water-front development, highway access is the most difficult to prescribe

in advance of the detailed design of the developer. The highways and driveways in the immediate vicinity of the development are details themselves to be worked out in consonance with the rest of the design. Highway communication between different sections of the Port is a part of the problem, however, and one to which the Port Authority can well give attention. The main thoroughfares must be adequate, as in present instances they often are not, to carry the truck traffic which the development will induce. Where waterways intervene, methods of crossing them must be found, and this will naturally lead to the consideration of ferries, vehicular tunnels, and bridge; crossing the majority of the wider waters of the port by any of these means usually involves at least two municipalities directly, while other municipalities more remote from the waters

may be prospective beneficiaries of the contemplated improvement. Therefore, provision of suitable highway access to the different sections of the port becomes a problem, and an im-

portant one, for a joint agency such as the Port Authority."

I direct your attention to this, Mr. Wilson, as part of the report of the predecessor, the Bi-State Commission, in 1921; and I ask you now whether, as a result of the studies of the Port Authority and of your connection with them and under your supervision, there has been any change in point of view with regard to this principle that I have just read to you.

The WITNESS. No. There is no change in that principle.

The MEMBER. Do I understand from that that you would reiterate

today what has been said there, as of a prior day?

The Witness. No. I mean that the principle of congestion forming along these waterfronts, and the need for improved highway facilities and crossings of these waterways, to tie in the two highway systems on each side, is just as much a need today as it was then, whenever congestion and delay begin to form at any of the existing facilities. The process keeps repeating itself as traffic grows, you see.

(The Witness continued his testimony as follows.)

With regard to the problem of congestion referred to at page 31, of the Bi-State Commission report, the use of Holland Tunnel and the subsequent determination by the Port Authority of the location of the Midtown Hudson Tunnel and the George

Washington Bridge, tended to solve the problem in the following way. The great density of traffic across the Hudson River has always been 42nd Street and south, centering around the ferry terminals. The provision of the Holland Tunnel at Canal Street acted as a main drainage channel, or artery, for a tremendous volume of traffic—relief for the ferries. The tunnel handles about 11,000,000 vehicles a year, and the ferries—any one individual ferry, probably, does not run very much over a million and a half—the big one possibly two million, but no more than that; so that any one of these new fixed facilities such as a bridge, or a tunnel, immediately pro-

vides a capacity equivalent to several ferries, and provides relief for these ferries and clears up the congestion that existed in the

streets surrounding their approaches.

The Inland Terminal ties in with this relief of congestion. The railroad pier stations are clustered around the rim of Manhattan Island south of 59th Street. There are about forty-five piers in the past that have been used for such facilities. At the present time there are somewhere around thirty-eight—still in use. It is necessary for merchants to go from their store doors and factory buildings in the center of the island to these various piers with crisscross movements and long hauls up and down the island in order to reach a particular pier station where there may be a particular car that

they want to get freight in going west. Under the pier 437 station method of operation, the railroads will park empty cars on car floats alongside the pier stations, and they will designate a certain car on a certain float, we will say, for Chicago. Well, there may not be any other car for Chicago on that particular railroad at any of the other pier stations, so that the merchant, if he is up at 35th Street, or 36th Street, and that car happens to be down parked on a float in the vicinity of Barclay Street, has got to drag his freight and his truck all the way downtown, until he gets to that particular pier where that particular car is berthed. Under the Union Inland Station idea, he will take it to the nearest of these union stations, and it will be sorted there, and it will be hauled from there to the railroad car that is most convenient for the movement, shortening the haul for the merchant very materially.

Mr. Cohen. I wish you would look at Exhibit 3. And, I direct your attention to the truck marked "Humberto Olive Oil," That

truck is not fully loaded, is it?

The WITNESS. No.

Mr. Cohen. Is that typical of the situation you referred to in the earlier part of your testimony, about the expensive operation by business in being obliged to ship a partially-loaded truck to one of the pier stations, instead of being able to take it thoroughly loaded with all its shipments to one union station?

The Witness. That is typical of a partial load on such a truck. It is merely a fragmentary load. Our studies and clockings showed that the average load coming to these pier stations was between one and two tons, while these trucks have capacities of two and three

tons.

438 Mr. Cohen. I will read to your Honor, so as to tie up the record for you, from page 25 of the Red Book (Stipulation

Exhibit B):

Bound up with the railroad freight problem in Manhattan is the system of markets and food distribution. This in one of the most important as well as difficult phases of the port problem, one that comes closest to the public, in as much as it affects the price and quality of the food put on the table at every meal."

Then appears the statement that: "New York is the market center of the country"—and it refers to the foodstuffs coming from all over the country. "On the lower west side of Manhattan has grown up the primary market for these goods. Here the railroads have pier stations devoted mainly to foodstuffs and several of the companies and transoceanic steamship companies handle foods in large quantities, and have their piers there." I am trying to shorten this, sir, by asterisks. "Each stop of the food means additional delay, additional handling, additional waste, and additional cost to the consumer. Yet the system is the growth of many years, and those engaged in it are seemingly agreed that it cannot successfully be changed. No one will deny that the present system is highly unsatisfactory. There must be fewer handlings."

The WITNESS. In the activities of my department, there are included such matters as dealing with the Federal Government, and urging them to adopt measures in the interest of relieving conditions

here; like providing more ice-breakers.

That field of activity can be classified as protecting the commerce of the port, and we have engaged in a number of such activities that involve the regulations for the better conduct of the Port's Commerce. In the case of ice-breakers, which you mentioned, I mentioned some time ago that ice conditions in the harbor, with these tidal estuaries, interfere with the movement of fuel oil, coal, building materials, et cetera, and last year and this year, in particular, we have had numerous requests from these outlying points for assistance in getting the harbor opened. We have taken those matters up promptly with the Coast Guard, which has a limited number of ice-breakers, but they are totally unequipped to do the full job, and so we arranged to have legislation introduced in Washington to provide additional ice-breakers for this purpose with the Coast Guard's approval. The bill passed Congress, and was vetoed.

Our activities are to survey the situation, and to take up with the appropriate Department of the Federal Government, that matter, for the purpose of securing the necessary relief. We have done that over a period of years in a great many different activities. We have also gone in and made a thorough survey of the movement of dangerous cargoes on boats about the harbor; explosives, gasoline, combined chemicals; and we have been instrumental in getting the Federal Government, through the Interstate Commerce Commission, and through the Bureau of Steamboat Inspection, to draft suitable regulations to better control this type of traffic, and to reduce the hazards; and we have had members of our staff given an opportunity of

assisting in the framing of those regulations.

40. Recently, there has been legislation by Congress permitting so-called free ports, or priff zones, to be established under the direction or authority of the Secretary of Commerce. Municipalities within the Port District have asked the Port Authority to make studies of several of the potential locations for such free ports or

tariff zones, and such studies have been made, under my direction The Mayor of the City of New York, the late and supervision. Mayor of Elizabeth, and the Mayor of Newark, have all asked at different times for the assistance of the Port Authority in surveying for them the possibilities of establishing one of these foreign trade zones within their respective communities. The Bureau of Commerce, under Mr. Hedden, under my general supervision, has made these three studies, which have been transmitted to the mayors. In the course of these it was necessary for us to do a great deal of field work interviewing-not only inspecting the sites, gathering data as to the cost of constructing new facilities at these sites, or improvingthe existing facilities, but surveying the potential traffic possibilities with steamship lines and representatives of industry throughout the Eastern portion of the United States. We have even had an investigator on the road as-far west as Chicago for several months, trying to dig up information on this subject.

The cities did not pay anything toward this study which the staff made for them at their request. That was all financed and paid for

by the Port Authority. And the factual data was made use of by the City staff in its application to the Secretary of Commerce for the license or certificate. The same situation applies with regard to work on free ports for New York City, Elizabeth, and Newark. We are not by law required to make a study like that if we are requested to do so by any of the municipalities within the Port District. It is entirely a matter of policy with our Commissioners; except that we are charged, in general terms, under the Compact with aiding and advising with local municipalities in the development of their port facilities. To that extent, we feel that we have an obligation to assist them; but there is no legal requirement whereby

The Member. Well, I suppose that means, then, that you have to use your own judgment as to whether this is one of the things that

the Compact requires you to be cooperative about?

The WITNESS. Whether it is within the general field.

The Member. If they ask you to do something, and you decide that it is not something which is within the general function of the Port Authority, you would not have to do it, and I suppose you would be under a duty to refuse to do it, would you not?

The WITNESS. That is the function of the Commissioners of the Port Authority, to make determinations upon each request.

Mr. Brasson. Don't you get paid for any of those studies?

The WITNESS. I don't recall that we have gotten any money out of any local municipality for any studies we made for them. We made a great many.

Mr. Cohen. I call your Honor's attention to this sentence in Section 8 of the legislation dealing with the Comprehensive Plan, occurring at page 44 of the Port Authority Statute Book (Stipulation Exhibit E): "It (referring to the Port Authority) shall render such advice, suggestion, and assistance to all municipal officials as will per-

mit all local and municipal port and harbor improvements, so far as practicable, to fit in with said Plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said Plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate."

Is your department actually in cooperation with municipal offi-

cials throughout the district?

(The Witness resumed his testimony as follows:)

From time to time yes—with the municipal officials of the City of New York, the City of Newark and with other cities within the port district. We are in conference from time to time with the Borough President of Manhattan, with reference to highways. We have had conferences with the City about the West Side Highway along the west side of New York, with a view to integrating the Midtown Hudson Tunnel approaches with that highway. We furnished them with a great deal of data and some suggestions and advice on that subject. It is a fact that the City, having a plan for

a vehicular tunnel across the Island of Manhattan, from 38th
443 Street, the approaches for the Midtown Hudson Tunnel have
been so laid out that they will fit in with the City's plan for its
tunnel. That was done in a cooperative way with representatives of

the City and our engineers working together.

Mr. Cohen. Now, as a matter of fact, will you say, in the light of your study of the work done before you came with the Port Authority, and the work that you have done since, that the only way that you can get a coordinated system of rail, water, highway, and motor truck transportation within this port district, is by just that method of cooperation?

Mr. Brabson. I object to that question as leading, purely for a conclusion, both of law, and the opinion of the witness on the subject.

Mr. Cohen. He is an expert, sir. I have the right to ask for his

opinion.

The Member. The question is whether a man with the experience that this witness has had, can throw any light upon the nature and character of the operations of this organization by stating what has been asked him, or stating what he has been asked to state. Now, it is not a conclusion. It is what his opinion is.

The Witness (having been directed to answer): Yes. There has to be such cooperation, and, above all else, there has to be some agency to bring it about, because cooperation in so vast an enterprise as this, and over such a large area, and with so many different governmental jurisdictions, involves not only state, municipal, county,

but also Federal cooperation. And, with so many private interests, unless there is some agency that is in a position to try to bring about a meeting of the minds between all of these different units, the problem is practically a hopeless one. Each

one has its own particular interest to protect. Each one has its own ideas, which are frequently divergent, and the Port of New York Authority, if it does nothing else, at least provides a strictly neutral,

impartial, and open-minded forum and agency for trying to bring these various conflicting elements into a common concept and under-

standing of our port transportation problems.

When we have held public hearings, it is not infrequent to have the various sections of the port appearing, opposing each other before the Port of New York Authority. I would say that we have that upon every project that comes up—divergent opinions. There is always a minority interest which feels that something should be done differently from the way that it is proposed to have it done. But it is always a minority opinion.

The Member. Those divergencies are divergencies arising from interests rather than mere divergencies of opinion on abstract questions, aren't they? The impression that I get from your statement about that is that all of these places and communities have their several interests at stake, and that the divergencies that are manifest in these hearings are divergencies that grow out of the desires of each community to protect what it regards as its practical interest—and not merely a divergency as to the scientific formulation of the unified problem; is that correct?

The WITNESS. That is correct!

Now, I will straighten this out, and just to illustrate this, in the case of the Greenville-Bay Ridge Tunnel, where after exhaustive studies, extending over many years and conferences with the railroads, we agreed on a general route between Greenville, Jersey City, and Bay Ridge, South Brooklyn. When we held a public hearing on it on September 10th last, individuals, one or two, came in and suggested that the tunnel be located somewhere else, so as to go through the neighborhood that they were interested in. People from the Red Hook section of Brooklyn wanted the tunnel put up there. People from Staten Island wanted the tunnel put down on Staten Island. None of them objected to the tunnel; they wanted it to go through their back yards.

We have had the same experience with the location of Inland Terminal No. 1. There were different people who had different ideas as to where it should be. We finally, after weighing all the different

claims, selected the site that met the majority approval.

Mr. Cohen. My attention has just been called to the matter of pier storage. If you would briefly tell his Honor what steps were taken by the Port Authority, through your Department, how the initiation came about which finally resulted in the legislation that has been passed by New York State, which appears in Chapter 711, Laws of New York, 1925, in the Supplement to the Port Authority Statute Book, at page 37 (Stipulation Exhibit E). How did they

start, how was it brought to your attention, how did you come to phrase and formulate these regulations, and how did you come to apply to the State of New York and the State of

New Jersey for this legislation?

The Witness. Some three or four years ago we received a number of complaints from shippers and receivers of steamship

freight in the Port of New York that they were suffering delays in their freight and added expense for trucking and for handling the freight on the docks by reason of congestion of these steamship piers, due to he practice of some of the steamship lines of holding freight off the ships for protracted periods of time on these docks. We were asked if we could help relieve conditions, and we sent our investigators to study the situation, and we found that in some cases. principally on competitive freight routes, such as a route where there would be a number of steamship lines running on the same trade route, and there was a highly competitive situation such as obtains between the Atlantic and Pacific companies through the Panama Canal, that these steamship companies were allowing the freight that came off their ships to lie on their docks for periods of a month, two months, three months, we even found one shipment that was there over a year without any charge being made to the consignee for storage. Supposedly they had an agreement among the steamship lines that they would allow so much free time on the dock after the ship was unloaded. The railroads had that practice as well at all their stations.

The instances of this were brought to our attention three or four years ago. The investigation disclosed that the condition was brought about by competition, that no one line was able to

force a consignee to take his freight off of their docks at the expiration of an arbitrary ten day free time period, because the consignee would immediately shift his patronage to a competing line that would give him more favorable concessions, and so as the lines gradually extended their free time to ten days, to three weeks, and to from three weeks to a month, etc., the practice had just grown up of practically disregarding the free time provision and leaving it there as long as the merchant wanted it. And he wanted it because it saved him having to truck that freight off the piers to a warehouse and pay warehouse charges. He would get in a large shipment of coffee from the south, some ten thousand sacks, and he could peddle that out to the trade by using the pier as a storage facility. Of course, that added to expense all along the line; it increased the fire hazard, it carried increased insurance rates on cargoes, and it involved some losses where fires occurred on some of these piers, and there immediately was a conflict of opinion between the Underwriters and the owners of the freight as to whether the freight in question was still carried on an ocean bill of lading or not. Our study of the situation found an attitude on the part of the steamship people that they would be very glad to have some regulations imposed by the Port Authority that would enable them, that would be uniform in character for the different piers of the Port, and some machinery for forcing the lines to live up to it.

We had several conferences with the lines as to what form that regulation should take. We made several drafts of the proposed regulations as to the length of time and how we would enforce it, and the machinery for inspection by our inspectors

at frequest intervals of the piers and records to see that the rules were being lived up to; and then we found when we had the regulations in print, in good shape, that some general enabling legislative authority appeared necessary to give us more specific authority to prescribe the specific rules and regulations. Under our Compact, in a general way, we may make rules and regulations, but before they become binding, they have to be returned to the legislatures for approval by those bodies. We then pepared companion bills carrying into effect the recommendations that we had worked out with the steamship companies, submitted those to the legislatures at Albany and Trenton, with the idea that when approved by them, we would also submit them to the Federal Government for approval. The New York Legislature passed its bill last year, and the New Jersey bill, I think, passed one branch of the Legislature, but did not pass the other before the Legislature adjourned.

This was brought about at the initiation of the Warehousemen's Association. The warehousemen joined with the receivers in asking relief. They not only asked us to do it, but they even carried the case to the United States Shipping Board. The case has been pending there for about a year, I should say, and they are waiting to see what we are able to work out here, the Shipping Board's

attitude apparently being, "Well, if you can solve this problem locally in the Port of New York by your own regulations, that may suffice for practical purposes."

The MEMBER. What is the Warehousemen's Association?

The WITNESS. It is one of these trade associations formed by the owners of warehouses in the Port of New York.

The MEMBER. What was their interest in it?

The WITNESS. They wanted freight moved off the steamship piers, so it would move into their warehouses, and they would get the rental.

The Member. Was the Bush Terminal Company included?

The WITNESS. They are a member of the Warehousemen's Association, yes.

The Member. Well, is this the same problem that you were saying, that the steamship companies were interested in? In having some regulation that would enable them to clear their piers?

The WITNESS. That is right.

The Member. You got the cooperation of the Warehousemen's Association, who also wanted to clear the steamship company's piers?

The WITNESS. The warehousemen were very anxious to clear the

steamship companies' piers, yes.

Mr. Cohen. I haven't covered the intervention of the Port Authority in I. C. C. cases, and what your department does in that. Give the court some indication of the nature of these cases and their number generally, so that he can see what our activities have been there.

The WITNESS. Actions frequently arise before the Interstate
Commerce Commission and Shipping Board brought by other
ports to obtain more favorable rate adjustments than they

now have in relation to the rates of the Port of New York. our fields in protecting the commerce of this Port has been to resist such attempts to divert commerce from the Port by participating in these hearings and collecting and offering evidence on behalf of the Port of New York to combat the attempts of the other ports. have, on the average I should say, five or six or seven or eight of those cases a year; some are very large cases. There is a case going on, which is a consolidation of two or three cases from the Gulf ports, working with the north and south rail lines in the Mississippi Valley, where they have been trying to divert a great deal of export and import traffic to Europe and to Africa, that formerly flowed through the North Atlantic Ports and the Port of New York, by getting more favorable rates out of the Mississippi Valley Lines for such commodities as automobiles moving out of Detroit and the Chicago territory. We have had to prepare evidence, submitted through our Bureau of Commerce, and Mr. Heddon in those cases. We have Shipping Board cases involving ocean rates and ocean practices brought by some of the out ports against the activities of steamship lines here that compete with the outports. We have had efforts made to merge New York Shipping Board lines with lines operating out of some of the smaller ports, and transfer the whole operation to the out port under the guise of economy,

and letting the smaller ports swallow the bigger lines.

Well, those activities come under our mandate from the two states to protect the Port of New York commerce, and we feel that it is right and proper that we should indulge in those, and we do it, and it involves a great deal of work in assembling work and cooperating with the local municipalities, who have an interest in its because of their investments in their docks; if the trade of New York suffers the returns from their dock properties will suffer.

The MEMBER. Who did that before the Port Authority was

organized?

The Witness. It wasn't done in any satisfactory way, with due modesty and humility, and that is the reason, I think, that New York enjoys so many handicaps of long standing. Such proceedings before the Port Authority was organized were few and far between.

The Member. Well, when there were those few, who undertook to protect, if I may use that word, what is regarded as the interests of New York Harbor, for example, as against the attack of Boston and

Philadelphia and Baltimore?

The WITNESS. Well, in the smaller cases, they usually arrive through the province of an individual industry, and the traffic managers of that industry will be opposed to the traffic managers of the railroads, but that industry case on one commodity will set a precedent for a rate adjustment that will affect many commodities.

The Member. Well, do you participate in cases that involve the

rate on a particular commodity?

The Witness. Only if it involves a principle that affects a large port rate adjustment, entirely inverted cases, that is only in certain cases.

As the cases increased in importance and magnitude, agencies like the Chamber of Commerce and the Produce Exchange and the Maritime Exchange and bodies like that, have come in to it in the past, and in the largest cases, such as the New York Harbor case—where New Jersey was seeking a rate adjustment lower than New York—even the states and municipalities have come into the picture.

The Member. Now, that is what I wanted to find out. Now, that having been so in the past, you say that now the Port Authority undertakes the representation of the Port of New York. Does the representation of the others still continue, or are you now in sub-

stitution for them?

The WITNESS. No; they still continue to cooperate with us, and they appear as parties to many of our briefs and we to theirs.

Mr. Cohen. Your Honor will note that before the creation of the Port District and the making of the Port Compact, there was no port as a whole, and hence the necessity for having a single agency.

The MEMBER. I know that there were controversies of long

standing.

Mr. Comen. Oh, yes.

The Member. As between Baltimore, Philadelphia, New York, and Boston.

Mr. Cohen. That is right.

The Member. And where you speak of them as the Port as a whole, it did affect those who were interested in the Port of New York. Now, what I am seeking to find out is whether in such

d53 controversies, assuming that there were some, that there have been some since the Port Authority's organization as there were before, whether the Port Authority is in substitution for, say, the State of New York, or the City of New York, or the New York Produce Exchange or others, or merely supplements their efforts; that

is what I want to understand.

Mr. Cohen. It coordinates their efforts.

The Witness. Yes; it functions in various ways; as I said earlier, it is a good coordinating agency; it brings the various parties together. If we have a rate case of this kind, we will call in representatives of these different agencies around the table, and we will discuss the procedure to be followed, and the evidence that each can adduce, and because of our studies over a long period of years, collecting data in the port on freight traffic and tonnage and rate situations, we have developed a mass of information that is very useful in these proceedings, which these other trade organizations and local governmental bodies don't have, and which it would take them a very long time and a great deal of expense to assemble, and which we have assembled by virtue of our other activities, and that

is how we contribute something to this process. We do not in any way attempt to supplant these organizations. We speak for them; we invite them to cooperate with us in these cases. As a matter of fact, there has been litigation before the Interstate Commerce Commission in which interests in New Jersey were allied against interests in New York, and each appeared by their own separate counsel, and the Port Authority intervened merely with reference to the Port as a whole.

Mr. Cohen. I call your Honor's attention at this time to the provisions of Article 13 of the Compact, page 22, the Port Authority Statutes; "The Port Authority may petition any Interstate Commerce Commission or like body, the Public Service Commission, Public Utilities Commission, or like body, or any other Pederal, Municipal, State, or local authority, administrative, judicial, or legislative, having (jurisdiction in the premises after adoption of the Comprehensive Plan as provided for in Article X, to the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight which in the opinion of the Port Authority may be designed to improve or better the handling of commerce in and through said District, or improve terminal or transportation facilities therein. It may intervene in any proceeding affecting the commerce of the Port."

And in Section VIII of the Comprehensive Plan, at page 43 of the Statute Books, it says this; "* * power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department and United States Shipping Board for suitable assist-

ance in carrying out said Plan."

The MEMBER. What is your position?

The Witness. Assistant General Manager in charge of operations and development. The General Manager is Mr. John E. Ramsey. We have a General Manager and two Assistant General Managers.

There is Mr. Mulcahy, who was to have been called but has

now been relieved. My department has a number of separate divisions and division heads under me. Division heads are the Chief of the Bureau of Commerce, General Superintendent of Bridges, Superintendent of Tunnel Operations, Superintendent of

Maintenance and Inspection, and Police Consultant.

My testimony so far deals with that part of my department which has to do with the development and effectuation of the Comprehensive Plan. The department heads in charge of the operating work, the bridges and tunnels, also report to me. We have police assigned to each of our facilities. They total about 300. As to their organization, on the Holland Tunnel we have two captains of traffic, and they have lieutenants and sergeants under them. On the George Washington bridge we have one captain with sergeants under him. On the Staten Island bridges we have a superintendent who acts as a captain, and he has assistant superintendents who act as lieu-

tenants, and they have sergeants under them, and the men report to the sergeants on each shift. They are all uniformed men, except the captains, superintendents and the assistant superintendents.

Mr. Cohen. I direct your attention to one of the sample provisions of the Statutes governing bridges, Section 3 of Chapter 97 of the Laws of New Jersey, page 116; "The Port Authority is authorized to make and enforce such rules and regulations and to establish and levy such charges and tolls as it may deem convenient or necessary for the operation and maintenance of the said bridge and to insure

at least sufficient revenue to meet the expense of the construc-456 tion, operation, and maintenance thereof, and to make provision for the payment of the interest upon and amortization and retirement of such bonds or other securities or obligations as it may issue or incur for the purposes of this Act as hereinafter provided."

Pursuant to those provisions in the various Statutes, has the

Port Authority made and enforced rules and regulations?

The WITNESS. We have.

Mr. Cohen. Has it established and levied such charges and tolls? The WITNESS. We have.

Mr. Cohen. How are the rates of tolls arrived at in order to com-

ply with the provisions of the statutes?

The Witness. The staff under my general supervision makes an analysis of the available volume of traffic that we expect for one of these facilities, and we work out what seems to us a reasonable toll schedule for the different classes of traffic, with due regard for the rate paid on other facilities which we operate and we recommend to our Commissioners what we think the level of charges should be. The Board studies our reports, figures and the Commissioners fix the level of toll rates, and we enforce those on our facilities. It is the same way with the traffic regulations; we will have conferences in nry office with our police consultant, our superintendent, our captains, and we discuss the experiences that we have and the difficulties that we have in handling traffic at any particular point, and that will give rise to a desired regulation which we then submit as a recommendation to the Commissioners and they promulgate them.

(The witness continued his testimony as follows:)

It was the result of studies in my department that led to the penal provisions of the laws in New York and New Jersey that appear in these statutes. (Stipulation, Exhibit E.) As to the method of caring for the violations: Our police officers are all peace officers in both States, New York and New Jersey, with the usual powers of a police officer to make summary arrests for misdemeanors committed in his presence, and felonies committed in his vicinity, and our men will either make summary arrests or will issue summonses, issue summons tickets to motorists as the particular situation seems to demand. We try to facilitate our patrons as much

as possible by not making life too hard for them, because after all we have got to encourage them to come on our properties, and where we can we issue summonses which are returnable at a future date in one of the local police courts where our men appear as complaining

witnesses for a violation of our regulations.

Mr. Cohen. I call your Honor's attention to pages 216 and 217 of the Port Authority Statute Book (Stipulation, Exhibit E), Chapter 388 of the Laws of New York, 1928, Section 154 of the Code, the New York Code, headed "Who are peace officers." And in the long list of peace officers, after describing the sheriff, constables, and marshals and policemen of a city, town, or village, appears the following, "Or a patrolman, officer, or other member of the police force appointed by the New York State Bridge and Tunnel

Commission and the New Jersey State Bridge and Tunnel Commission in the administration of the Holland Tunnel or of the police force appointed by the Port of New York Authority upon any of its bridges now or hereafter authorized to be built and/or operated by it, who is a resident of the State of New York."

(The witness resumed his testimony as follows:)

There is a constant request upon us to reduce our rates. Those requests have been given consideration frequently, given careful study from time to time by the staff under my general direction. We analyze our traffic, we analyze our revenues, we analyze our operating expenses and our debt charges for the purpose of seeing whether it is possible to make any of these reductions and still meet all of our expenses, and at the rate we are going so far it has not been possible for us to recommend to our Commissioners that any reductions be made, for we are just making enough to meet all of our charges and our expenses.

Mr. Cohen. Well, is the policy of the Port Authority and your staff to make a profit out of the operation of these facilities or is it the policy to operate them at the lowest possible tolls or charges consistent with the protection of the bondholders as required by the

Statutes?

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The Witness. We don't aim to make a profit; we merely aim to pay our interest charges, and to pay back the money that we have borrowed, and that is all that we try to get from our level of toll rates. The legislation which has declared in both States that all

the bridge and tunnel crossings should be treated together has had the following effect on the fixing of tolls on any particular

bridge or tunnel:

In a general way we have treated these facilities as a unit, with the recognition that on the Hudson River, for example, it does not appear practical to have a different level of toll rates on neighboring facilities, because of the burden it would throw upon the facility with the lowest toll rates; so the rates have been kept practically finiform. In Staten Island, where we have got a different situation, we have established some so-called commutation rates on a monthly basis, for the purpose of developing business, but we have not established

lished any such rates on the Hudson Wer.

The fifteenth floor of the Port Authority building is occupied wholly by the Port Authority, with the exception of a minor portion held by the Triborough Bridge Authority, a public agency building the Triborough Bridge. In that space are the public hearing room, the Legal Department, the Engineering Department, and others.

Mr. Cohen. I will read into the record these parts of the stipulation which I understand will not be contested, so as to save time: "Upon entering the Port Authority's employ, Mr. Wilson took an oath of office. Mr. Wilson was required to submit monthly time reports, itemizing the number of hours worked in each day, and the number of hours worked each day over and above the seven standard hours. His duties were prescribed by the general man-

ager of the Port Authority, to whom Mr. Wilson was required to submit reports on such matters, as the general manager 460 from time to time required. All of his duties brought Mr. Wilson under the immediate and direct supervision of the general manager of the Port Authority, and on occasions when Mr. Wilson differed with the general manager on matters that other matters within the operation or involved his employment, he was directed to proceed in accordance with the direction of the general manager. Mr. Wilson was furnished with an office by the Port Authority, and in the Port Authority's general offices. He was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and personnel of his staff engaged in the various activities under Mr. Wilson's direction, were supplied by the Port Authority, who were regular employees of the payroll of the Port Authority: Traveling expenses and other expenses incurred by him in connection with the performance of his duties were paid by the Port Authority. Mr. Wilson had no outside office, no outside business connection or association of any kind whatsoever during the year 1933. He received no outside income during the year 1933 except such as was received from securities and investments owned by him. His name appeared on the payroll of the Port Authority, and he was required to sign that payroll, as were all employees of the Port Authority. He is a resident of the County of Bronx, City and State of New York."

I should like to read at this time, so that we can dispose of it, the facts with regard to Mr. Mulcahy, which are stipulated:

and ever since has been an employee of the Port of New York Authority. During the year 1932 Mr. Mulcahy was employed as an assistant general manager of the Port of New York Authority and received a salary of \$10,950 for that year.

"Mr. Mulcahy's employment has continued from June 1, 1928, to the present date. On entering the Port Authority's employ, Mr. Mulcahy took an oath of office. It was understood that Mr. Mul-

cany was to be at the office of the Port Authority, New York City, on each and every working day from nine a. m. to five p. m., and from nine a. m. to twelve noon on Saturday, the normal working hours of all Port Authority employees, except, of course, on such occasions as his Port Authority duties might require his presence elsewhere. It was agreed that although generally the petitioner would be required to devote only the above mentioned hours to the Port Authority duties, he would, whenever necessary, devote such extra time to his duties as might be required without any extra compensation. As a matter of fact, Mr. Mulcahy's duties as assigned for the year 1932 constantly required his presence at the offices of the Port Authority at hours other than and in excess of the normal working hours of other Port Authority employees. As assistant general manager in charge of administration, Mr. Mulcahy's duties as assigned for the year 1932; involved the supervision of the entire personnel of the Port of New York Authority. He was the administrative assistant to the general manager, and as such assistant was engaged in all phases of the work of the Port

Authority in the execution of the Compact, the Comprehensive Plan, of the various statutes amendatory thereof and supplementary thereto. His duties were prescribed by the general manager of the Port Authority, to whom Mr. Mulcahy was required to submit such reports on such matters as the general manager from time to time required. In all of his duties Mr. Mulcahy was under the immediate and direct supervision of the general manager of the Port Authority, and on occasions when Mr. Mulcahy differed with the general manager in matters involving administration or other matters within the scope of his employment, he was directed to proceed in accordance with the direction of the general manager. Mr. Mulcan'y was required to submit monthly time reports, itemizing the number of hours worked in each day, and describing the work performed, the number of hours spent in connection with each type of work, and the number of hours worked each day over and above the standard seven hours. Mr. Mulcahy was furnished with an office by the Port Anthority, and in the Port Authority's general offices. He was supplied with all necessary supplies and materials by the Port Authority. His office force, stenographers, and perconnel of his staff engaged in the various activities under Mr. Mulcahy's direction, were supplied by the Port Authority, and were regular employees on the payroll of the Port Authority. Traveling expenses and other expenses incurred by him in connection with the

performance of his duties, were paid by the Port Authority. Mr. Mulcahy had no outside office, no outside business association or connection of any kind whatsoever during the year 1932. He received no income whatever during the year 1932 except compensation paid him by the Port Authority. Mr. Multhy's name appeared on the payroll of the Port Authority, and he was required to sign the payroll, as were all employees of the Port Authority. He is a resident of the City, County, and State of New York."

Cross examination by Mr. Brabson:

The Witness. There are about 300 police on the Port Authority's staff in round numbers. It has in all departments slightly in excess of 1,000 employees. Certain of our men are loaned to the Tri-Borough Bridge Corporation on a contract basis. By this I mean on a part time, part salaried basis. The Tri-Borough Bridge Corporation pays them a salary and we pay them a salary, and they work part time for each; that is my understanding of it; I have no such men in my own department. I am not very familiar, in fact I am not familiar with any of the details of these arrangements; they are made by men in other departments, except I know in a general way that there are some such arrangements.

The Port Authority neither owns nor operates any facilities other than those which are reported in its annual reports that I know of. It neither owns, leases, nor operates any piers, docks, wharves, ferries,

tug boats, ferry slips, nor dredges. It has no pier terminals in a strict sense. It does own this Inland Terminal No. 1 which

is a substitute for pier terminals.

The Port Authority has never dredged a channel. It does have in its activities and has taken part in the matter of harbor sanitation and pollution. We have gone into some studies of that subject with representatives of the States and have advised with representatives of local municipalities, county officials, on the questions of sanitation and harbor pollution. The Port Authority has cooperated with other agencies issuing rules for navigation and commerce, in helping them formulate the rules to be issued. It has of its own authority issued rules or regulations affecting navigation only in connection with navigation around some of our own facilities, where there might be damage to them during construction. In such cases we have put up certain restrictions during construction.

As to rules and regulations with regard to commerce as contrasted with navigation we have issued regulations affecting the movement of commerce over all our facilities and all of our highways—all of our motor vehicle rules for motor trucks and busses, the regulations for trucking, the regulations for trucks entering our building, etc. Those are all commerce regulations which we have issued pursuant to law. They are solely in connection with the traffic using

our facilities.

The Port Authority has improved certain docks and pier facilities. When the Holland Tunnel was built by the predecessor Commission of the Port Authority, certain pier properties were destroyed, d65 old piers, and we built over the Holland Tunnel on each side of the Hudson River new piers, new modern steel and concrete piers that are in use today by steamship companies. In the

case of the Midtown Tunnel likewise on the New York side before that is completed we will construct a new and modern pier at that location.

The pier that we rebuilt was not solely in connection with the protection of the Holland Tunnel but was to replace a pier that was destroyed by the construction of the Holland Tunnel, with a better pier and a more modern one. That pier belongs to the City of New York on the New York side and to the Erie Railroad on the New Jersey side. In other words we replaced a facility which we had to remove for construction purposes.

Mr. Brabson. Has the Port Authority established any lighthouses

or buoys?

The Witness. We have constructed lights, we have erected navigation lights, if by lighthouses you mean all the illumined aids to navigation. We have lighted buoys or a lighted beacon on shore to assist the ships. All that is in the general category of a lighthouse, if that is what you mean, we have done that,

All of these navigation lights are on our bridge facilities, to assist navigation. We have not established any lights otherwise than in connection with our facilities. The Port Authority has no buoys, has established no channel markings, except in connection with its facilities; and the Port Authority owns no lighters or car floats, no tugs, barges, scows, or habor craft of any kind.

With regard to the so-called underground electric system, it has not been abandoned. The construction of this first Inland

Terminal was an element of the whole system. When the automatic electric system was planned it was to run into the basement of these inland freight stations, and the system was a system as a whole—tracks, cars, and terminals. Now we have constructed the terminal portion in part of that automatic electric system. We have not constructed the tunnel portion of the system. As a measure of quicker relief, which our Compact calls upon us to provide, we have these alternates in the Midtown Tunnel, the George Washington Bridge and the Holland Tunnel for the movement of commerce to and from the station.

In hearings before the Interstate Commerce Commission the Port Authority has not appeared repeatedly in opposition to municipal bodies. In some cases it has appeared in opposition to railroads and other transportation facilities; in other cases we have supported

the railroads' position.

The Port Authority has attempted to fix rates for lighterage in the harbor district but only through negotiations with the railroads. There are as far as the railroads are concerned no rates for lighterage; lighterage is performed as a part of their general terminal service, the same as switching on land, and most of the lighterage freight of the railroads is handled without any charge for it as a part of the through movement.

A large percentage of the waterfront on Manhattan Island is owned by the City. South of 59th Street, which is the section we have studied mostly, the City owns in excess of 95 per cent.

Some of the pier facilities on this waterfront are leased to railroads by the City; some the City leases to steamship companies; other facilities it leases to private terminals, such as coal yards, sand yards, and things of that kind, and some of the property of course is owned by the State. There are some private holdings. Some of the City properties are not leased at all but are used as open docks and paid for on a kind of toll or fee basis. In some cases I think at least this condition used to exist a few years ago, unless it has been changed, the City would lease land under water and let private parties build their own facilities on it. The City leases waterfront property upon which the railroads and other parties build ferry terminals.

(At Mr. Brabson's request the witness indicated on a map the location of the Lackawanna ferries in relation to the Holland

Tunnel.)

The Lackawanna ferries run from Hoboken across to Barclay Street which is about one mile away from the Holland Tunnel. There is another Lackawanna ferry that comes across to Christopher Street, the Christopher Street ferry is about three quarters of a mile from the Holland Tunnel. There are no ferry companies operating in close proximity to the Holland Tunnel; I would say that the Lackawanna ferry is the nearest.

Other ferries operating in that vicinity are those of the Pennsylvania Railroad, Central Railroad of New Jersey, and the Erie Rail-

road which are further down town in the vicinity of Cortland
468 Street, and further up town in the vicinity of 23rd Street,
which is over two miles from the Holland Tunnel. Pennsylvania ferries are probably something over a mile from the Holland
Tunnel. There are no ferries operating in the vicinity of the George
Washington Bridge. The Dyckman Street Ferry is about two miles
north of that bridge. That ferry has for years suspended operations every winter during the ice season because of the heavy ice
floes in that portion of the river, but it has resumed operations
every summer and has continued to run every summer.

As to the allocation of space in the Inland Terminal, the ground floor and basement are leased by the Port Authority to the several railroads under a lease to which all the user railroads are signatory, so that it is leased to them jointly and they operate the space. How they allocate it to themselves, or if they make any allocation at all, I do not know. I have seen certain railroad signs on the outside of the building put up by the railroads for their own convenience on their leased premises. They have nothing to do with the Port Authority, that is an integral part of their own activities.

Prior to the erection of the Holland Tunnel there were no other vehicular bridges or tunnels under the Hudson River. There were, however, certain railroad tubes under the Hudson River. The Pennsylvania Railroad had two single track tubes in the vicinity of West 32nd Street, and the Hudson and Manhattan Railroad had two single track tubes near Christopher Street and two tubes near Cort-

land Street. There were six railroad tubes prior to the erection of the Holland Tunnel, that is, three systems of two tubes each. There were no vehicular tubes. The railroad tubes were

all passenger facilities, without handling any freight.

All of the new streets which the Port Authority has constructed are either in connection with our own facilities or are approaches leading to the facilities, but they are not directly connected with it except through intervening streets and other ramps and channels. They were not exactly built for the benefit of our facilities; they were built to facilitate the commerce of the port. You see some of them are a mile away from our facilities and they are not used exclusively. by tunnel or bridge traffic; some of them handle as much as 25 per cent of traffic that does not use our facilities and from which we get no revenue. They are built only partially because of the additional traffic that would come to our facilities. You must understand that this movement of traffic is a very complicated thing; at the same time it is very simple, it follows the lines of least resistance, and as soon as we build a new facility and build a new concrete street, with nothing but cobblestone streets on either side, all local traffic in that territory will use that new improved highway that we built, even though it is not tunnel or bridge traffic.

The Port Authority does not own any part of any belt line in the Port district having to do with railroads. The nearest railroad facilities on the New Jersey side of the proposed Greenville-

470 Bay Ridge tunnel which we propose to build are the Pennsylvania's terminals, although the Lehigh Valley's terminals are immediately adjoining. On the New York side the present rails are owned by the Long Island Railroad, which is considered the Pennsylvania and used by the New Haven and the Long Island engines.

(The witness was excused.).

Mr. Cohen. I should like to call your Honor's attention, in view of the questions that were asked of Mr. Wilson concerning sanitation, to Article 22 of the Port Authority statutes, the article dealing with definitions and to the definition of a rule or regulation: "Rule or regulation until and unless otherwise determined by the legislatures of both states, shall mean any rule or regulation not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of Congress for the improvement of the conduct of navigation and commerce within the district, and shall include charges, rates, rentals, or tolls fixed or established by the Port

Authority and until otherwise determined as aforesaid, shall not in-

clude matters relating to harbor or river pollution."

We, sir, have always interpreted that to mean a limitation upon our power to make rules and regulations, dealing with sanitation, but not as a limitation upon the general powers to deal with all port and harbor conditions. May I state, for your Honor's information,

that there has been an inclination on the part of both states to treat the harbor and pollution problem as a separate prob-

Iem, and that is being solved at the present time by a separate compact dealing with harbor pollution.

Whereupon both sides rested.

Counsel for the taxpayers then made a closing statement for the petitioners. Closing statements and expositions of law and facts were made for the respondent by Mr. Uriell and Mr. Brabson.

The petitioners submitted their trial brief and respondent was given 45 days within which to answer, and the petitioners were given 30 days thereafter within which to reply.

Whereupon the hearing was concluded.

The foregoing evidence included all of the exhibits filed by the parties in evidence at the hearing before the Board of Tax Appeals constitutes all of the material evidence herein, and the same is approved by the undersigned, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue.

Approval of statement of evidence by counsel

The foregoing evidence including all of the exhibits filed by the parties in evidence at the hearing before the Board of Tax Appeals constitutes all of the material evidence herein, and the same is approved by the undersigned, Julius Henry Cohen, General Counsel for The Port of New York Authority, as attorney for

the respondents on review.

(Signed) Julius Henry Cohen,
General Counsel for The Port of New York Authority,
Attorney for respondents on Review.

Order settling state:nent of evidence

This statement is duly approved and settled this 23rd day of July 1937.

(Signed) J. M. STERNHAGEN,
Member, United States Board of Tax Appeals.

473 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 77375

B. T. A. No. 77377

B. T. A. No. 80769

[Titles omitted.]

Order for consolidation

Upon consideration of the joint motion of the parties to the above entitled causes, and it appearing to the satisfaction of the Court that the motion should be granted, It Is, by the Court, this 15th day of

July 1937, Ordered:

474 (1) That, for purposes of record, briefing, hearing, argument, and decision, the three causes as captioned hereinabove are consolidated and are to be heard upon a single printed record consisting of such documents as the parties have indicated by Praecipe for Record, and

(2) That the Statement of Evidence in these causes be printed but once in the Transcript of Record on review, and that, so printed, it is to be taken and accepted as and for a Statement of Evidence

in each of the causes captioned herein, and

(3) That all exhibits called for by the Praecipe for Record herein are to be transmitted in physical form by the Clerk of the United States Board of Tax Appeals to the Clerk of this Court and by him held until the hearing herein, and then produced for the aid of Court and counsel.

And it is further ordered that the Clerk of this Court transmit a certified copy of this Order to the Clerk of the United States Board of Tax Appeals, which certified copy is to be included by him in the record on review herein as transmitted.

By the Court,

(S) MANTON, United States Circuit Judge.

PEW-GA 7-9-37.

A true copy,

[SEAL]

(S) Wm. Parkin, Clerk.

475 In United States Circuit Court of Appeals for the Second . Circuit

B. T. A. No. 77375

B. T. A. No. 77377

B. T. A. No. 80769

[Titles omitted.]

Praecipe for record

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Cir476 cuit, copies duly certified as correct of the following documents and records in the above entitled causes in connection with the Petitions for Review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency letter, in each of the above cases.

(b) Answer in each of the above cases.

- (c) Commissioner's motion to amend the Findings of Fact in the solidated case,
- (d) Commissioner's motion to reconsider the opinion and decision of the Board and to vacate or modify the same to conform to the facts of record:
- (e) Taxpayers' motion in opposition to amendment of Findings of Fact, including Taxpayers' motion for additional Findings of Fact.
- (f) Taxpayers' motion in opposition to Commissioner's motion for a reconsideration.

3. Findings of Fact, opinions and decisions of the Board.

- (a) Findings of Fact and opinion promulgated October 28, 1936.
- (b) Judgment entered October 31, 1936, in each of the above cases.(c) Order denying motion to amend Findings of Fact.

(d) Order denying motion for reconsideration.

4. Petition for Review and Assignment of Error, together with proof of service of notice of filing Petition for Review and of service of a copy of Petition for Review, in each of the above cases.

5. Statement of Evidence as settled and allowed, including the

Stipulation of Facts.

6. All Exhibits filed in evidence including both those made a part of the Stipulation of Facts and those filed in evidence during the course of the hearing, are to be transmitted to the Clerk of the Circuit Court of Appeals for the Second Circuit in physical form.

- 7. Order extending the time for completion of the record and transmission thereof to the Circuit Court of Appeals for the Second Circuit.
- 8. Stipulation of consolidation of causes on review, and for inclusion in record of but one Statement of Evidence.

9. This Praccipe.

Morrison Shafroth, Morrison Shafroth, Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within proceeding is hereby admitted this — day of —, 1937.

General Counsel of The Port of New York Authority,

Attorney for Respondents.

478 [Clerk's certificate to foregoing transcript omitted in printing.]

430 In United States Circuit Court of Appeals for the Second Circuit

Nos. 87-89. October Term, 1937

Argued Nov. 3, 1937. Decided Nov. 3, 1937

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PHILIP L. GERHARDT, RESPONDENT

SAME, PETITIONER

v.

BILLINGS WILSON, RESPONDENT

SAME, PETITIONER

v.

JOHN J. MULCAHY, RESPONDENT

Appeal from the Board of Tax Appeals

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Berryman Green, of Norfolk, Va., for petitioner. Julius Henry Cohen, of New York City, for respondents.

Opinion

Per Curiam.

Orders affirmed in open court on authority of Brush v. Commissioner (C. C. A.) 85 F. (2d) 32; Ten Eyck v. Commissioner (C. C. A.) 76 F. (2d) 515, and People ex rel. Rogers v. Graves, 299 U. S. 401, 57 S. Ct. 269, 81 L. Ed. 306.

481 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

PHILIP L. GERHARDT, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed Nov. 10, 1937

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel. On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax

Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in

accordance with this decree.

WM. PARKIN, Clerk.

[File endorsement omitted.]

483 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER vs.

BILLINGS WILSON, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed Nov. 10, 1937

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN, Clerk.

484 [File endorsement omitted.]

485 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

JOHN J. MULCAHY, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed Nov. 10, 1937

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in

accordance with this decree.

WM. PARKIN, Clerk.

· 486 [File endorsement omitted.]

487 [Clerk's certificate to foregoing transcript omitted in printing.]

488

Supreme Court of the United States'

No. 779, October Term, 1937

Order allowing certiorari

Filed February 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of

this application.

Supreme Court of the United States

No. 780, October Term, 1937

Order allowing certiorari

Filed February 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it

is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

The Chief Justice took no part in the consideration or decision of

this application.

490 Supreme Court of the United States

No. 781. October Term, 1937

Order allowing certiorari

Filed February 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

The Chief Justice took no part in the consideration or decision

of this application.

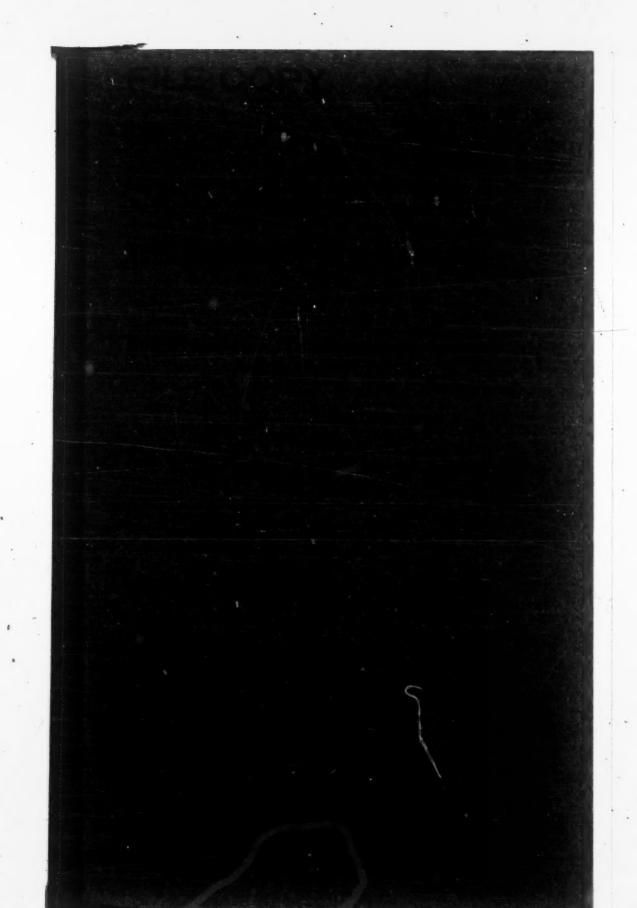
(Endorsement on cover:) File Nos. 42260, 42261, 42262. U. S. Circuit Court of Appeals, Second Circuit. Term No. 779. Gut T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Philip L. Gerhardt. Term No. 780. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Billings Wilson. Term No. 781. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. John J. Mulcahy. Petition for writs of certiorari and exhibit thereto. Filed February 10, 1938. Term Nos. 779 O. T. 1937, 780 O. T. 1937, 781 O. T. 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. -

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PHILIP L. GERHARDT

No. -

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BILLINGS WILSON

No. -

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN J. MULCAHY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Second Circuit entered in the above causes on November 10, 1937, affirming the decisions of the United States Board of Tax Appeals.

OPINIONS BELOW

The per curiam opinion of the Circuit Court of Appeals for the Second Circuit (R. 481) is reported in 92 F. (2d) 999. The findings of fact and opinion of the Board of Tax Appeals (R. 43–77) are reported in 34 B. T. A. 1229.

JURISDICTION

The judgments of the court below were entered on November 10, 1937 (R. 481–482). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the compensation received by the taxpayers for services performed during the respec-

The cases involve the tax liability of three taxpayers. Five proceedings were begun before the Board of Tax Appeals. The cases were there consolidated and heard together. Three petitions for review were filed in the court below, which for purposes of record, briefing, hearing, argument, and decision were consolidated (R. 473-474). Accordingly, a single petition for certiorari is filed in this Court. Two petitions for review were filed in the Circuit Court of Appeals for the Third Circuit, but it has been stipulated that decision in those cases will abide the final decision in the instant cases.

tive years in issue, as employees of the Port of New York Authority, is exempt from Federal taxation on the ground that such a tax would be an unconstitutional burden on the States of New York and New Jersey.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 32–38.

STATEMENT

A. The Establishment of the Port Authority

The Port of New York Authority (hereinafter called Port Authority) is a bi-state corporation created by compact between the States of New York and New Jersey on April 30, 1921 ² (R. 44–45, 277), and confirmed by the Congress of the United States, by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174 (R. 45, 277).

This compact was made pursuant to the recommendation of a Joint Commission authorized by the legislatures of the two States and appointed by the governors of the States of New York and New Jersey, in 1917 (R. 280), for the purpose of surveying and investigating the transportation and terminal facilities and port and harbor conditions in and around the Port of New York (R. 47). This Joint Commission, after its survey, made a report to the legislatures of the two States in 1918, in which it

² Laws of New York, 1921; Vol. I, c. 154, p. 492; Laws of New Jersey, 1921, c. 151, p. 412.

recommended an interstate compact to provide a bistate corporate agency to carry out a comprehensive port and harbor development under the direction of the two States (R. 47, 280, Ex. A.*). Subsequently, the Joint Commission, in 1919, having completed its survey, after reviewing the increasing commerce of the Port, the inefficiency of its terminal facilities, and the resulting hardship on the eight million inhabitants of the district, described the port problem as primarily a railroad problem and urged the adoption of an improvement plan comprising a complete reorganization of railroad terminal facilities, joint operation and connection of railway belt lines, pier improvements, the establishment of good distribution stations, warehouses, highways, and the like (R. 47-48, 280).

Thereafter a bi-state legislative commission was appointed to cooperate with the Joint Commission in revision of a tentative draft of a compact submitted by the Joint Commission in 1918 (R. 281), and in 1919 the Joint Commission, having completed its survey, presented to the legislatures and the governors of its respective States its "Joint Report with Comprehensive Plan and Recommendations" (R. 281; see Exhibit B). Thereafter, the legislatures of New York and New Jersey authorized certain Commissioners, on the part of the respective States, to execute an agreement or compact between the States, in the form set forth in the

³ References to exhibits are to the original exhibits filed with the Clerk of this Court.

Acts of the respective States. This was done and the compact approved by Congress (R. 283-284).

Pursuant to Article X of the Compact of April 30, 1921, and in accordance with the findings and recommendations of the Joint Commission, the legislatures of the two States adopted the Comprehensive Plan recommended by the Joint Commission for adoption by the two States (R. 286). The States embodied the Comprehensive Plan in Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922, and it was approved by Congress in Joint Resolution of July 1, 1922, c. 277, 42 Stat. 822 (R. 286; Exhibit E, pages 30 to 46).

The Comprehensive Plan provides in part as follows (R. 287):

Section 8. The port of New York Authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state to effectuate the same, except the power to levy taxes or assessments *. *. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effecting the pledge of the states in said compact, but it shall have no power to pledge the credit of either state or to impose any obligation

upon either state or upon any municipality, except as and when such power is expressly given by statute, or the consent of any such municipality is given.

The compact, which recites that the objects sought are "a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York" confers upon the Port Authority the powers and jurisdiction stated as follows (Ex. E, pp. 19–20):

* * * to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. (Art. VI.)

and such additional powers as might thereafter be delegated to it by the legislatures of the two States or by Congress (Art. III).

Among the powers and restrictions imposed upon the Port Authority by the compact of April 30, 1921 (Ex. E), are the following: (1) It shall not pledge the credit of either State (Art. VII). (2) The facilities of the Authority are expressly subject to the jurisdiction and control of the public utilities commissions of either State to the same extent as a private corporation (Art. VIII). (3) Any municipality within the port district retains full power to develop its own port and terminal

facilities (Art. IX). (4) The Authority is to make plans for the development of the Port, but they must have the legislative approval of both States before becoming effective or binding on them (Art. XI). (5) The Port Authority may petition the legislatures of the two States, Congress, interstate commerce, and public utility commissions with respect to matters within its jurisdiction (Arts. XII, XIII). (6) Until its revenues are adequate, the legislature of the two States shall appropriate equal amounts (up to \$100,000 a year) for administrative expenses (Art. XV). (7) Subject to the authority of state and federal law, the Port Authority may prescribe rules for the improvement of navigation and commerce, which are binding only on approval of the legislatures of both states (Art. XVIII). (8) The right by the governor to veto the action of any commissioner appointed from his State is reserved (Art. XVI). (9) The two States (rather than the Authority) shall have power to provide or impose penalties for violation of its rules and regulations (Art. XIX).

Under the provisions of the Comprehensive Plan (Ex. E) the contemplated projects were as follows:

a. Railroad tunnel or tunnels connecting transcontinental railroad lines terminating in New Jersey, with the Long Island Railroad, the New York Connecting Railroad and the New York Central and New York, New Haven and Hartford Railroads in Brooklyn and the Bronx (1924 Report, p. 46; all annual reports were introduced as Exhibit G, R. 290). b. A vehicular bridge or tunnel across the Arthur Kill River, connecting New Jersey and Staten Island (Ex. E, p. 36).

c. A bridge or tunnel from New Jersey to Manhattan, connecting New Jersey railroads with Manhattan railroads and providing for transportation of standard railroad cars into Manhattan (Ex. E, p. 37).

d. Railroad belt lines enumerated in the plan and terminal facilities in connection with an automatic

'electric system (Ex. E, p. 42).

The early operations and activities of the Port Authority, which it is not thought necessary to set out in detail here, appear from the stipulation of the parties (R. 276-472).

B. The Operations of the Port Authority

During the taxable years here in issue, 1932 and 1933, the activities of the Authority were as follows:

1. THE OPERATION OF BRIDGES AND TUNNELS

a. The Arthur Kill Bridges, known as Goethals Bridge and Outerbridge Crossing (R. 292–293).

These are interstate vehicular bridges, construction of which was begun in 1926 and completed in 1928 at a cost in excess of \$17,000,000 (R. 292), the Goethals Bridge being between Elizabeth. New Jersey, and Staten Island, New York, and Outerbridge Crossing being between Perth Amboy, New Jersey, and Tottenville, New York (R. 292).

These two bridges, from completion through the taxable years in issue here, were operated by the Authority with resulting surpluses or deficits as follows (R. 293):

1928	surplus	\$272, 676. 75	
1929	deficit	23, 340. 21	
1930	surplus	76, 683, 54	
1931	surplus	40, 673. 37	
1932	deficit	187, 272, 17	4
1933	deficit	295, 534, 46	
1934	deficit	298, 851. 29	

The deficits during 1932 and 1933 were due, according to the Authority's Annual Reports, in part to "general business depression seriously affecting the gross revenues," but "the larger portion of this decrease" was "due primarily to a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52; 1933 Report, p. 51). See also the 1930 Report, p. 54.

These bridges were operated in direct competition with the Perth Amboy Ferry and the opening of the bridges forced the Perth Amboy Ferry to reduce its toll charges, and in 1932 the opening of the Outerbridge Crossing Bridge forced a "further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52).

The Tottenville and Elizabeth Ferries were both forced to reduce services after the construction of the two bridges (1929 Report, p. 46), and a ferry running between Carteret, New Jersey, and Staten Island, has gone out of business since the opening of these two bridges (1929 Report, p. 46).

b. The George Washington Bridge.

This interstate vehicular bridge over the Hudson River between Fort Lee, New Jersey, and the Borough of Manhattan, New York City, New York, was erected at a cost in excess of \$57,000,000, and was completed in 1931 (R. 295). During the taxable years in issue this bridge was operated by the Authority, with resulting net income from operations, prior to deductions for amortization, as follows (R. 296):

1931	\$504, 264. 08
1932	1, 473, 363, 61
	1, 142, 770. 42
	1, 356, 476, 67

This bridge, as are the Goethals and Outerbridge Crossing bridges, is in competition with privately owned ferries which it affects in operations and revenues (1926 Report, pp. 14–16; R. 363, 365–366).

c. The Bayonne Bridge.

This is an interstate vehicular bridge over the Kill van Kull River, between Bayonne, New Jersey, and Port Richmond, Staten Island, New York. The bridge was opened to traffic on November 15, 1931, and was erected at a cost in excess of \$13,000,000 (R. 297–298). This bridge was operated by the Authority with a resulting annual net surplus or deficit as follows (R. 298–299):

	surplus	\$25, 400, 29 101, 466, 11
W. Co. Co.	deficit	240, 890. 18
1934	deficit	163, 848, 67

The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason

This bridge, as are the previously mentioned bridges, is in competition with privately owned ferries and affects their revenues and has reduced their traffic and earnings (R. 363, 365–366).

In the operation of these bridges the Authority maintains, under state authority, a uniformed police force (R. 54).

d. Operation of the Holland Tunnel.

Subsequent to the construction by the New York Interstate Bridge and Tunnel Commission and the New Jersey Interstate Bridge and Tunnel Commission acting as a joint Commission, the Holland Tunnel was operated for a number of years by that Commission. These two Commissions were merged with the Authority in 1930, which was thus vested by the States of New York and New Jersey with the control, operation, and maintenance of the tunnel (R. 303–304). This interstate vehicular tunnel under the Hudson River between Jersey City, New Jersey, and the Borough of Manhattan, New York City, New York, was operated from the time of its acquisition by the Authority, at a net income as follows (R. 102):

1931 Net Income (Annual Report, p. 74)	\$3, 031, 987, 89
1932 Net Income (Annual Report, p. 74)	2, 605, 076, 96
1933 Net Income (Annual Report, p. 76)	2, 440, 987, 15

As in the case of the George Washington, Bayonne, and Arthur Kill bridges, the operation

that although the bridge was opened for traffic on November 15, 1931, as aforesaid, the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1931 (R. 299).

of the Holland Tunnel by the Authority is in direct competition with privately owned ferries across the Hudson River and has compelled the private ferries to reduce their toll charges and revenues (R. 363, 365–366).

e. The construction of an interstate vehicular tunnel under the Hudson River from Weehawken, New Jersey, to the Borough of Manhattan at 38th Street, to be known as the Midtown Tunnel, at an estimated cost in excess of \$37,500,000 (R. 308).

Upon completion this tunnel will compete with privately owned ferries and compel reduction in tolls with resulting loss in revenues to such privately owned ferries (R. 363, 365–366).

2. INTERSTATE BUS LINE

Since March 1, 1931, and through the taxable years in issue, the Authority has owned and operated with its own personnel an interstate bus line from Elizabeth, New Jersey, Port Richmond, Staten Island, and New York, over the Goethals Bridge (1934 Report, pp. 38, 39), and from the operation of this bus line the Authority derives income (R. 319).

3. COMMERCE BUILDING AND INLAND TERMINAL NO. 1

During the taxable years in issue, the Authority has been engaged in completing the construction of, and the operation of, the Commerce Building and Inland Terminal No. 1, some fifteen stories in height (R. 318, 348). Thirteen floors of the building

are devoted to commercial purposes. The street level floor and the basement are devoted to the purpose of the Inland Terminal and one floor, the second, has been devoted to exhibit purposes (R. 348). A portion of the street level floor is used as store area devoted to the conveniences of the building, on which are located a barber shop, a beauty shop, a cafeteria, a United States post office, and a bank, all of which are operated by commercial concerns except the United States post office, and all pay rents to the Authority for the space which they occupy (R. 349). The upper floors of this building are constructed in such manner as to be suitable for rental and occupancy for manufactur. . ing, office and industrial business uses (R. 318). Revenue derived from the non-terminal portion of the building annually produces more income than that portion of the building devoted to the Authority's uses (R. 349). The building has no physical connection with any railroad facilities, nor with any dock, pier, wharf, or other marine facilities. All of the freight, both incoming and outgoing, is handled by trucks (R. 358). The basement of a large portion of this building was leased to eight railroads for use as a transfer terminal for a period of five years with options to renew the leases for nine additional five-year periods.

During the taxable years the Terminal operated at only a small fraction of its capacity of 680,000 tons (R. 349, 379), handling between fifty and seventy thousand tons a year (R. 379). The base-

ment of the building is occupied and used by the Railway Express Agency (R. 380). The Authority, in the operation of the Commerce Building and Inland Terminal No. 1, through rental agents, sohicited and procured tenants for the building (R. 349-350). The building is at present 95% rented (R. 416). The Authority has carried on an active and extensive campaign in advertising the building in order to secure tenants (Ex. Q), in which it represented that while the building was designed primarily for industrial uses, it also had the advantages of an up-to-date office building (Exs. Q, P, A, N; R. 359). In the operation of the building the Authority comes into direct competition with the operation of privately owned buildings (R. 354). The space in the Commerce Building is divided as follows (1930 Report, p. 44; R. 348):

	Square feet	
	152, 940	
Office space		
Manufacture and loft space	1:842.000	
Manufacture and fort space	210221000	
Freight terminal purposes	282,650	
r reight terminar par posts	112, 200	
Stores	112, 200	

C. In General

All of the income, revenues, and receipts of the Authority have been derived from the following sources (R. 319): (a) Toll charges from bridges and tunnels; (b) Rentals of Inland Terminal No. 1, paid by the railroad carriers; (c) Income received from rentals received from the upper floors of Inland Terminal No. 1; (d) Rentals derived

⁵ All bridges and tunnels owned and operated by the Authority at all times up to and including the present time exact the payment of a toll charge by vehicles using them (R. 319).

from real estate purchased but not yet devoted to uses in connection with the Comprehensive Plan; (e) Interest from investments in sinking reserves and other funds; (f) Revenue from operation of bus line over Goethals Bridge; (g) Interest on bank balances; and (h) Miscellaneous income such as rental of telephone ducts, sales of gasoline, tire changes, and advances by the States, made under the provisions of the compact and Comprehensive Plan, until such time as the Port Authority is self-sustaining.

The Authority has made numerous studies of marine, railway, and highway traffic problems. It has induced the Federal Coast Guard to clear the harbor of ice. It has promulgated a regulation as to the storage period for railroad freight. It has advised municipalities in the district. (R. 62-63.)

The Authority's Annual Reports for the taxable years in issue show that the Port Authority expended in effectuation of the "Comprehensive Plan" the following sums: \$207,188.88 (1931 Annual Report, p. 89); \$189,575.35 (1932 Annual Report, p. 86); \$138,610.75 (1933 Annual Report, p. 84). It does not appear that any part of the funds expended by the Port Authority as above set out during the years in question was used to pay any part of the compensation of the respondents.

During the taxable years in issue the net income from the operation of the Authority's facilities was as follows (R. 66):

1.	,		
N	6 1931 (74)	1932 (74)	1933 (75)
Operating revenue (tolls, etc.)	\$7, 367, 288. 39	\$6, 197, 799. 49	\$9, 755, 245, 91
Net income	3, 602, 325. 63	2, 605, 076. 96	3, 112, 953. 78

⁶ Figures in parenthesis indicate page in respective Annual Report where figures are found.

All of the operating revenues and tolls of the Port Authority derived from its various facilities are specifically pledged as security for the payment of its outstanding bonds and obligations, which pledge constitutes a lien upon such revenues and tolls (Ex, E, pp. 49, 73, 296; 1931 Report, pp. 57–58). The Port Authority has authority under the compact to mortgage its facilities and other property now held or to be acquired by it if it so desires (Art. VI).

There is no provision or saving clause in the compact, Comprehensive Plan or any of the statutes of either State dealing with the Port Authority which provides for its final liquidation or dissolution or for the reversion of its properties and facilities to either or both of the two States.

The Authority is expressly prohibited from levying any taxes or assessments (Ex. E, p. 43). All penalties for violation of its rules for its facilities must be enacted by the legislatures of the two States and must be enforced in the regularly established courts of the two States (Compact, Art. XIX). All transportation facilities of the Port Authority are expressly subject to regulation

by the Public Service Commission of both States to the same extent "as if such * * * facility were owned, leased, operated or constructed by a private corporation" (Compact, Art. VIII).

All of the bridges and tunnels owned and operated by the Port Authority are interstate in character, and hence are subject to the power of Congress over such commerce under the Constitution of the United States. The rules and regulations of the Port Authority as to its bridges and tunnels over navigable waters are expressly made subject to the power of Congress over such facilities (Compact, Art. XXII).

The operations and activities of the Port Authority during the years in question were in connection with its facilities. It has not undertaken any projects to develop the harbor of New York in any way. It has never dredged a channel and has no dredges or facilities to do so (R. 464). It neither owns, leases, operates, nor has it constructed or improved for its own use any piers, docks, wharves, slips or pier terminals (R. 463). It does not own or operate any tugs, barges, or marine equipment which could be used for the improvement or conduct of navigation (R. 463-464). It has established no harbor, markings, buoys, lights, bells, or any other means for improving navigation, nor has it issued rules or regulations affecting navigation or commerce, except in connection with lights on its own bridges (R. 465).

The facilities constructed and operated by the Authority were financed principally by bond is-Approximately 90% of the funds needed by the Authority were provided by such issues. The financing afforded by the States of New York and. New Jersey was approximately 10% of the Authority's needs and such sums as were advanced by the two States were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States (R. 308-309).

The amounts derived by the Authority for its several projects by advances from the States or by bend issues are as follows:

111 = 1 = 1	States loan	Bond issue
Agthur Kill Bridges George Washington Bridge Bayorine Bridge Folland Tunnel. Commerce Building Inland Terminal	\$4, 200, 000 9, 800, 000 4, 100, 000 None None	1 \$14, 000, 000 2 50, 000, 000 3 12, 000, 000 4 50, 000, 000 4 16, 000, 000
TotalAdd: Midtown Tunnel construction	18, 100, 000 400, 000	142, 000, 000 4 37, 800, 000
Total	18,500,000	179, 500, 000

I R. 201, 292.

Of the advances made, settlement of the State of New Jersey's advances of \$4,500,000 was made by the issue of \$2,500,000 bonds, thus reducing the advances by the States to \$14,000,000 and increasing the bond total to \$182,000,000.

¹ R. 295.

^{4 1931} Annual Report, p. 57; 1932 Ahnual Report, p. 54.

[§] R. 306-307, 308.

D. The Taxpayers

The three taxpayers, during the taxable years in issue, were employees of the Authority (R. 338, 368, 461). The taxpayer Gerhardt was employed with the title of Industrial Consultant at a salary of \$8,500 a year and during the taxable year 1933 received a salary of \$8,137.50 (R. 338). He was employed from May 16, 1931, throughout the taxable years in issue.

The taxpayer Wilson was employed as Assistant General Manager of the Authority and received a salary of \$14,625 for the year 1933 (R. 367–368). The taxpayer Wilson was employed by the Authority throughout the taxable years in issue (R. 368).

The taxpayer Mulcahy was employed by the Authority during the year 1932 as Assistant General Manager of the Authority and received a salary of \$10,950 for that year (R. 461).

The three taxpayers are citizens of the United States and residents of New York (R. 219, 237, 255).

E. The Proceedings Below

The Board of Tax Appeals held (R. 72–77) that the Authority was engaged in the performance of a sovereign function of each of the two States of New York and New Jersey and that the compensation received by the three taxpayers during the taxable years here in issue was constitutionally immune from income tax and entered its decisions accordingly.

The court below, in a per curiam opinion, affirmed the decisions of the Board of Tax Appeals on the authority of Commissioner v. Ten Eyck, 76 F. (2d) 515 (C. C. A. 2d); New York ex rel. Rogers v. Graves, 299 U. S. 401; and Brush v. Commissioner, 85 F. (2d) 32 (C. C. A. 2d).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the functions exercised by the Port of New York Authority during the years in question were governmental functions of the States of New York and New Jersey.

2. In failing to hold that in the operation of its several facilities the Port Authority was performing proprietary functions of the States of New York and New Jersey.

3. In holding that the Port Authority functioned as an agency of the States of New York and New Jersey in the exercise by those States of their sovereign powers.

4. In failing to hold that since the Port Authority functioned under a compact between the States of New York and New Jersey, subject at all times to the consent of the Federal Government, the Port Authority was not engaged in the performance of sovereign functions of the two States such as to be immune from taxation.

TPetitioner is of opinion that Brush v. Commissioner, 300 U. S. 352, was intended by the court below as authority, since Brush v. Commissioner, 85 F. (2d) 32, was reversed in that case.

- 5. In extending the principle of tax immunity to state functions in the field of interstate commerce, supreme authority over which has been granted to the Federal Government under the Constitution.
- 6. In holding that the compensation received by the taxpayers for services rendered during the taxable years in issue as employees of the Port Authority was constitutionally immune from Federal income tax.
- 7. In affirming the decisions of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS

This petition presents several questions of constitutional law which are of the first importance. In addition, a decision by this Court is necessary finally to put at rest a controversy which has plagued both the Federal taxing authorities and the Port Authority, and an answer to which is necessary to point the way to a disposition of the tax questions which are accumulating about the growing use by States of commissions and authorities. often interstate in nature, to perform functions analogous to those of the Port Authority. The questions which require decision are: (1) whether the activities of the Port Authority are proprietary or governmental in nature; (2) whether the Port Authority and its employees can be said to be immune from Federal taxation in view of the fact that the Authority was created by and functions under an interstate compact approved by Congress; (3) whether the Port Anthority and its employees are immune from Federal taxation in view of the paramount power of the Federal Government over interstate commerce; and (4) whether, if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax.

1. THE ACTIVITIES OF THE PORT AUTHORITY ARE PROPRIETARY

The Port Authority is engaged in some activities, such as the maintenance of a police force on its projects, which are concededly governmental in nature. Other activities, such as the operation of a bus line and the erection and operation of a commercial office and terminal building, are just as clearly proprietary in character. But the great bulk of its functions fall into a somewhat more debatable area: This is the construction and operation of its great toll bridges and tunnels. These activities seem to the petitioner to be clearly proprietary in character under the decision in Helvering v. Powers, 293 U. S. 214. No reason appears why the operation of an elevated railway should be proprietary while the operation of a toll bridge or tunnel should be governmental in nature. It is recognized that, if Brush v. Commissioner, 300 U.S.

^{*}It is not contemplated that it will be necessary to urge this last question. It is set out in this petition to guard against any thought that the Government has conceded, or has foregone its right to raise, the issue.

352, were extended sufficiently, its implications might be thought to weaken the authority of *Helvering* v. *Powers*. But the Government does not so read the case and submits that the decision of the court below raises a question which should be decided by this Court.

Related to this question is the manner in which a great enterprise such as the Port Authority is to be treated when some of its activities are governmental and others are proprietary. New York ex rel. Rogers v. Graves, 299 U. S. 401, 407–408, implies that the question is one as to whether the enterprise is primarily or predominantly either governmental or proprietary. Certainly, the Port Authority—a great commercial enterprise in the sense that it derives millions of dollars of revenue in competition with private operators—should not be granted a complete tax immunity merely because an inconsiderable part of its activities may be said to be governmental in character.

This case presents in clear focus the necessity for the application of the principle so frequently announced by this Court that the doctrine of inter-

⁹ It is unnecessary at this stage of the proceedings to enter into controversy with respondents as to whether the functions of the Port Authority in planning the harbor development and traffic flow is governmental or proprietary in nature. It may be supposed that similar work is done alike by the governments involved, the local chambers of commerce, and the large railroads. However this may be, the great bulk of the Authority's activities remain the construction and operation of bridges, tunnels, and the terminal building.

governmental tax immunity is not to be so applied as to cripple the taxing power. Willcuts v. Bunn, 282 U. S. 216, 225; James v. Dravo Contracting Co., No. 3, present Term. In particular, it calls for application of the rule that the States cannot withdraw sources of Federal revenue by engaging in activities to which the Federal taxing power would normally reach. South Carolina v. United States, 199 U. S. 437; Ohio v. Helvering, 292 U. S. 360, 368-369; Helvering v. Powers, supra; United States v. California, 297 U.S. 175, 184-185. During each of the taxable years in question the Port Authority derived between \$6,200,000 and \$9,750,000 in gross operating revenues (supra, p. 16). It is probable that not all of these revenues were drained from its private competitors, but it is obvious that, if the Port Authority and its employees are exempt from Federal taxation, an important source of Federal revenue has vanished.

2. THE PORT AUTHORITY IS NOT AN AGENCY OF THE STATES ALONE

The Port Authority was created by and operates under a compact between the States of New York and New Jersey which was approved by an Act of Congress (supra, p. 3). Without this approval of Congress, the compact would have been inoperative and the Port Authority would not have been created.

In the memorandum filed on behalf of the Attorney General in Hinderlider v. La Plata River and

Cherry Creek Ditch Co., No. 437, present Term, there are set out the considerations which serve to demonstrate that such a compact has the status of See Pennsylvania v. The an Act of Congress. Wheeling Bridge Co., 13 How. 518, 566; Missouri v. Illinois, 200 U.S. 496, 519; Wedding v. Meyler, 192 U. S. 573, 581. Under this view the Port Authority is created under an Act of Congress and certainly cannot be said to be an instrumentality of the States such that taxation of its employees by the United States is forbidden by the Constitution. This status seems recognized in the compact itself. Not only did the Act of Congress reserve the right to alter, amend, or repeal the approving resolution, but the compact gave to the Port Authority such additional powers as shall be conferred on it by the two legislatures or by Congress (Art. III).

Even if a compact which has been approved by Congress should be viewed as something less than an Act of Congress, the fact remains clear that under Article I, Section 10, clause 3, of the Constitution it has life only through the participation of Congress. Since the United States by express direction of the Constitution is given the absolute power to determine whether or not the compact shall be made and the Port Authority created, it seems quite impossible that taxation of the Port Authority employees by the United States should represent an unconstitutional threat to the necessary independence of the States of New York and New Jersey.

The court below, in affirming the Board's decision (R. 74-75) that the Port Authority is a sovereign instrumentality the employees of which are immune from Federal taxation, has applied the doctrine of tax immunity mechanically and in a situation where its reasons are absent. The reason for that rule "is found in the necessary protection of the independence of the national and state governments," Helvering v. Powers, 293 U.S. 214, 225, and, "Springing from that necessity it does not extend beyond it." Board of Trustees v. United States, 289 U.S. 48, 59. Even if it be assumed that the necessary independence of the State is threatened by a Federal income tax upon a state employee, it cannot be thought that an agency which is dependent upon Congress for its very existence has a similar claim to independence of the Federal Government. Since the Port Authority has no such independence of the United States, the reason for the rule of tax immunity is absent.

3. THE PORT AUTHORITY OPERATES IN INTERSTATE COMMERCE, SUBJECT TO THE PARAMOUNT POWER OF CONGRESS

Apart from the fact that the Port Authority-was created by a compact requiring the consent of Congress, it seems evident that it cannot claim a constitutional independence of the United States in view of the fact that almost all of its activities are in or directly affect interstate and foreign commerce.

In the Joint Resolution of August 23, 1921 (c. 77, 42 Stat. 174), consenting to the compact creating the Port Authority, it was provided "That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement" and that "the right to alter, amend, or repeal this resolution is hereby expressly reserved." Similar qualifications, with the additional proviso that no bridges or tunnels should be erected across or under waters of the United States except with the approval of the Secretary of War and the Chief of Engineers, were made in the Joint Resolution. consenting to the execution of the Comprehensive Plan (c. 277, 42 Stat. 822, 826). The compact itself subjected the rule making power of the Port Authority "to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce" (Art. XVIII). The interstate bridges could be constructed only with the consent of Congress, and in each of the three consents Congress expressly provided that the bridges should be subject to the Act of March 23, 1906, regulating the construction of bridges over navigable waters (Acts of March 2, 1925, c. 389-391, 43 Stat. 1094-1095). Under the terms of this Act, inter alia, the Secretary of War and the Chief of Engineers must approve the location and the plans of the bridge, the Secretary of War may regulate the toll rates, and he may even, after notice and hearing, direct the removal of the bridge if it be

found to be an unreasonable obstruction to navigation or if the lawful orders of the Secretary or the Chief of Engineers are disobeyed. (Act of March 23, 1906, c. 1130, 34 Stat. 84; U. S. C., Title 33, Secs. 491–498.)

It seems quite plain that the bridges of the Port Authority are completely subject to the paramount Federal authority. Similarly, its interstate tunnels are obviously within the field of interstate commerce, granted to Congress by the Constitution. There can be no doubt that the bus line operated by the Authority over its interstate bridges, and its . terminal facilities so far as used for interstate shipments, are similarly subject to whatever appropriate control Congress should think necessary in its regulation of interstate commerce. The functions of the Port Authority in planning the development of the Port of New York are, of course, within a field of control wholly subject to the power of Congress. Wisconsin v. Duluth; 96 U. S. 379, 387; Philadelphia Co. v. Stimson, 223 U. S. 605, 634-638.

The Government does not argue that the tax in question is an exercise of the power to regulate interstate commerce. It does contend that, since the United States is supreme in this field, the implications of the Constitution do not assure to the States, when they act in this field, that they shall be independent of and immune from the effect of operation of the Federal Government. If the Constitution does not assure the States, acting in this capacity, of their independence of the United

States, then there is no basis for the claim of tax immunity and it must fall (see *supra*, p. 26).

4. THE IMPORTANCE OF THE QUESTIONS

It is unnecessary to underscore the importance of the issues presented by this case. This Court has never passed on any of the three contentions which have been outlined above. In each of these questions the Government feels its position to be sound. Unless this Court settles the matter there will be protracted litigation throughout the various circuits. Whether the Government or the court below should ultimately be proved to be correct, there will have been much litigation and much uncertainty before the issue is finally resolved. If our views should ultimately be upheld in a later case, there will, in addition, have been lost substantial annual revenues improperly withheld from the Federal taxing power by the decision of the court below.

It is recognized that there is no conflict of decisions, and that the Board of Tax Appeals and another Circuit Court of Appeals have held against the Government, in cases more or less analogous to this. Moisseiff v. Commissioner, 21 B. T. A. 515 (Port Authority employee); Carey v. Commissioner, 31 B. T. A. 839 (employee of New Jersey Interstate Bridge Commission); Commissioner v. Harlan, 80 F. (2d) 660 (C. C. A. 9th) (employee of Golden Gate Bridge and Highway District); Commissioner v. Ten Eyck, 76 F. (2d) 515 (C. C. A. 2nd) (chairman of Albahy Port District). But it seems plain that these decisions are not so evidently

correct that the important questions of constitutional law presented in this petition can be taken to be settled.¹⁰

We have no precise information as to the number of port, harbor, and bridge organizations that are affected by the questions presented in this case. The American Association of Port Authorities, in a brief filed amicus curiae in the court below listed established organizations or boards in 29 ports and 4 state-wide organizations which were members of its association. Recent compacts approved by Congress have authorized the creation of at least 7 commissions with functions more or less similar to those of the Port Authority." It is evident that the question is one of first importance.

¹⁰ It may be noted that respondents in the court below attacked the Government's failure to secure a final decision by this Court in the cases cited above and stated that the persistent "attacks" by the Bureau of Internal Revenue were a danger "not only to the stability of the Port Authority, but also to similar state agencies" and that "Such attacks are destroying that certainty which is the essence of a government of laws" (Br. 4–7).

The Palisades Interstate Park Commission, Act of August 19, 1937, c. 706, 50 Stat. 719; The Buffalo and Fort Erie Public Bridge Authority, Act of May 3, 1934, c. 196, 48 Stat. 662; Lake Champlain Bridge Commission, Act of Feb. 16, 1928, c. 87, 45 Stat. 120, amended Act of August 23, 1935, c. 625, 49 Stat. 736, and Act of June 4, 1936, c. 504, 49 Stat. 1472; The Delaware River Joint Toll Bridge Commission Act of August 30, 1935, c. 833, Sec. 9, 49 Stat. 1058; Niagara Frontier Bridge Commission, Act of June 17, 1930, c. 499, 46 Stat. 764; Interstate Sanitation Commission, Act of Aug. 27, 1935, c. 779, 49 Stat. 932; and Potomac Valley Conservation District, Act of Aug. 31, 1937, c. 891, 50 Stat. 884.

Wherefore, it is respectfully submitted that this petition for writs of certiorari should be granted.

GOLDEN W. BELL,

Acting Solicitor General.

FEBRUARY 1938.

APPENDIX

Act of March 3, 1899 (Rivers and Harbors Act), c. 425, 30 Stat. 1121:

Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal. navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. (U.S. C., Title 33, Sec. 401.)

Act of March 23, 1906 (General Bridge Law of 1906), c. 1130, 34 Stat. 84:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. C., Title 33, Sec. 491.)

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said

bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. (U. S. C., Title 33, Sec.

492.)

SEC. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals

thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles. animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (U. S. C., Title 33, Sec. 494.)

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. (U. S. C., Title 33,

Sec. 498.)

Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174:

Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following, namely:

[Here follows the text of the compact.]

And

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the afore-

said acts: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: Provided, That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly

reserved.

Approved August 23, 1921.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) General definition.—"Gross income" includes gains, profits, and income derived

from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 22 (a) of the Revenue Act of 1932 is identical with Section 22 (a) of the Revenue Act of 1928, supra.

Regulations 74:

ART. 51. What included in gross income.—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law.

ART. 643. Compensation of State officers and employees.—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or politisubdivision. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision; and (b) the services are rendered in connection with the exercise of an essential governmental function.

Regulations 77:

Article 51 is identical with Article 51 of Regulations 74, supra.

Article 643 is identical with Article 643 of Regulations 74, supra.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 779

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

PHILIP L. GERHARDT

No. 780

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BILLINGS WILSON

No. 781

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN J. MULCAHY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The per curiam opinion of the Circuit Court of Appeals for the Second Circuit (R. 233)¹ is reported in 92 F. (2d) 999. The findings of fact and opinion of the Board of Tax Appeals (R. 21–38) are reported in 34 B. T. A. 1229.

JURISDICTION

The judgments of the court below were entered on November 10, 1937 (R. 234–235). Petition for certiorari was filed February 10, 1938, and was granted on February 28, 1938. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the compensation received by the taxpayers for services performed during the respective years in issue, as employees of the Port of New York Authority, is exempt from Federal taxation on the ground that such a tax would be an unconsti-

The case involves the tax liability of three taxpayers. Five proceedings were begun before the Board of Tax Appeals. The cases were there consolidated and heard together. Three petitions for review were filed in the court below, which for purposes of record, briefing, hearing, argument, and decision were consolidated (R. 231). Accordingly, a single petition for certiorari was filed in this Court. Two petitions for review were filed in the Circuit Court of Appeals for the Third Circuit, but it has been stipulated that decision in those cases will abide the final decision in the instant cases.

tutional burden on the States of New York and New Jersey.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 66-79.

STATEMENT

The facts, as found by the Board (R. 21-35), as stipulated by the parties (R. 130-162), and as disclosed by the annual reports of the Port of New York Authority (hereinafter called Port Authority), may be summarized as follows:

A. THE ESTABLISHMENT OF THE PORT AUTHORITY

The Port Authority is a bi-state corporation created by a compact agreed to by the States of New York and New Jersey on April 30, 1921² (R. 21, 130), and approved by the Congress of the United States, by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174 (R. 45, 130).

The Port of New York lies between the States of New York and New Jersey. It has long been recognized that a coordinated development of the port was necessary and that this could not be accomplished by separate action of the two states (R. 22–23). In 1917 a Joint Commission was authorized by the legislatures of the two States and appointed by the governors (R. 132), for the purpose

² Laws of New York, 1921, Vol. I, c. 154, p. 492; Laws of New Jersey, 1921, c. 151, p. 412.

of surveying the transportation facilities and port and harbor conditions (R. 22). This Joint Commission, after its survey, made a report to the legislatures of the two States in 1918, in which it recommended an interstate compact to provide a bi-state corporate agency to carry out a comprehensive port and harbor development under the direction of the two States (R. 23, 132, Ex. A.*). The Joint Commission, in cooperation with a bi-state legislative commission, made a subsequent report known as "Joint Report with Comprehensive Plan and Recommendations" (Ex. B). The report reviewed the increasing commerce of the Port, the inefficiency of its terminal facilities, and the resulting hardship on the eight million inhabitants of the district. It described the port problem as primarily a railroad problem and urged the adoption of an improvement plan comprising a complete reorganization of railroad terminal facilities, joint operation and connection of railway belt lines, pier improvements, the establishment of distribution stations, warehouses, highways, and the like. The Joint Report contained a suggested form for the compact and a comprehensive plan for the development of the Port (R. 22-23, 132-133). Thereafter the legislatures of New York and New Jersey authorized Commissioners, on the part of the respective States, to execute an agreement between the

^{*} References to exhibits are to the original exhibits filed with the Clerk of this Court.

States, in the form set forth in the Acts of the respective States. This was done on April 30, 1921, and the compact approved by Congress (R. 133–134). Pursuant to Article X of the compact, the legislatures of the two States in 1922 adopted the Comprehensive Plan recommended by the Joint Commission (R. 134–135); New York, L. 1922, c. 43; New Jersey, L. 1922, c. 9. It was approved by Congress on July 1, 1922, c. 277, 42 Stat. 822 (R. 135; Ex. E., pp. 30–46).

The Comprehensive Plan provides in part as follows (R. 135):

SEC. 8. The port of New York Authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically prac. ticable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state to effectuate the same, except the power to levy taxes or assessments The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effecting the pledge of the states in said compact, but it shall have no power to pledge the credit of 'either state or to impose any obligation upon either state or upon any municipality, except as and when such power is expressly given by statute, or the consent of any such municipality is given.

The compact, which recites that the objects sought are "a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York," confers upon the Port Authority the powers and jurisdiction stated, as follows (Ex. E, pp. 19–20):

* * to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and to make charge for the use thereof; and for any of such purposes to own, hold, lease, and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it (Art. VI).

and such additional powers as might thereafter be delegated to it by the legislatures of the two States or by Congress (Art. III).

Among the powers and restrictions imposed upon the Port Authority by the compact of April 30, 1921 (Ex. E; infra, pp. —), are the following: (1) It shall not pledge the credit of either State (Art. VII). (2) The facilities of the Authority are expressly subject to the jurisdiction and control of the public utilities commissions of either State to the same extent as a private corporation (Art. VIII). (3) Any municipality within the port district retains full power to develop its own port and terminal facilities (Art. IX). (4) The Authority is to make plans for the development of the Port, but they must have the legislative approval of both States

before becoming effective or binding on them (Art. XI). (5) The Port Authority may petition the legislatures of the two States, Congress, interstate commerce, and public utility commissions with respect to matters within its jurisdiction (Arts. XII, XIII). (6) Until its revenues are adequate, the legislature of the two States shall appropriate equal amounts (up to \$100,000 a year) for administrative expenses (Art. XV). (7) Subject to the authority of state and Federal law, the Port Authority may prescribe rules for the improvement of navigation and commerce, which are binding only. on approval of the legislatures of both states (Art. XVIII). (8) The right by the governor to veto the action of any commissioner appointed from his State is reserved (Art. XVI). (9) The two States (rather than the Authority) shall have power to provide or impose penalties for violation of its rules and regulations (Art. XIX).

Under the provisions of the Comprehensive Plan (Ex. E) the contemplated projects were as follows; (1) Railroad tunnel or tunnels connecting the trans-continental railroad lines terminating in New Jersey with those terminating or having connections in Brooklyn and the Bronx (p. 36). (2) A vehicular bridge or tunnel across the Arthur Kill River, connecting New Jersey and Staten Island (p. 36). (3) A bridge or tunnel from New Jersey to Manhattan, connecting New Jersey railroads with Manhattan railroads and providing for trans-

portation of standard railroad cars into Manhattan (p. 37). (4) Some fifteen railroad belt lines, and terminal facilities, to be operated in connection with an automatic underground electric system serving Manhattan (p. 42).

B. THE OPERATIONS OF THE PORT AUTHORITY

During the taxable years here in issue, 1932 and 1933, the activities of the Authority were as follows:

1. THE OPERATION OF BRIDGES AND TUNNELS

The Arthur Kill Bridges, known as Goethals Bridge and Outerbridge Crossing, are interstate vehicular bridges; the Goethals Bridge is between Elizabeth, New Jersey, and Staten Island, New York, and Outerbridge Crossing is between Perth Amboy, New Jersey, and Tottenville, Staten Island, New York (R. 138). Construction of the bridges was begun in 1926 and completed in 1928 at a cost in excess of \$17,000,000 (R. 138). These two bridges, from completion through the taxable years in issue here, were operated by the Authority. The resulting net income, after paying interest on funded debt but before transfers to reserves for debt retirement, was as follows (R. 138):

	surplus	\$272,	676.	75
1929	deficit	23,	340.	21
1930	surplus	76,	683.	54
1931	surplus	40,	673.	37
	deficit	187,	272	17
1933	deficit	295,	534.	46

In 1937, the deficit was \$191,940.61 (1937 Report, pp. 40, 61).

The deficits during 1932 and 1933 were due, according to the Authority's Annual Reports, in part to "general business depression seriously affecting the gross revenues," but "the larger portion of this decrease" was "due primarily to a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52; 1933 Report, p. 51). See also the 1930 Report, p. 54.

These bridges were operated in direct competition with the Perth Amboy Ferry and the opening of the bridges forced the Perth Amboy Ferry to reduce its toll charges, and in 1932 the opening of the Bayonne Bridge forced a "further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52).

The Tottenville and Elizabeth Ferries were both forced to reduce services after the construction of the two bridges (1929 Report, p. 46), and a ferry running between Carteret, New Jersey, and Staten Island, has gone out of business since the opening of these two bridges (1929 Report, p. 46).

The George Washington Bridge is an interstate vehicular bridge over the Hudson River between Fort Lee, New Jersey, and New York City. It was erected at a cost in excess of \$57,000,000, and was completed in 1931 (R. 139). From completion through the taxable years in issue this bridge was operated by the Authority, with resulting net in-

come from operations, after deducting interest but prior to transfers to sinking fund reserves, was as follows (R. 140):

1931	\$504, 264. 08
1932	1, 473, 363, 61
1933	1, 142, 770. 42

In 1937 the net income was \$2,099,639.66 (1937 Report, pp. 35, 60).

This bridge, as are the Goethals and Outerbridge Crossing bridges, is in competition with privately owned ferries which it affects in operations and revenues (1926 Report, pp. 14–16; R. 174, 175–176).

The Bayonne Bridge is an interstate vehicular bridge over the Kill van Kull River, between Bayonne, New Jersey, and Port Richmond, Staten Island, New York. The bridge was opened to traffic on November 15, 1931, and was erected at a cost in excess of \$13,000,000 (R. 140, 141). This bridge was operated by the Authority, through the taxable years in issue, with a resulting annual net surplus or deficit, after interest payments, as follows (R. 141):

1931	surplus 4	\$25, 400. 29
1932	deficit	101, 466. 11,
1933	deficit	240, 890. 18.

In 1937 the deficit was \$298,917.07 (1937 Report, pp. 38, 61).

^{*}The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason that the Port Authority did not regard the construction program as completed until the end of the year 1931 (R. 141).

This bridge, as are those previously mentioned, is in competition with privately owned ferries, affects their revenues and has reduced their traffic and earnings (R. 174, 175–176).

The Holland Tunnel is an interstate vehicular tunnel under the Hudson River between Jersey City, New Jersey, and the Borough of Manhattan, New York City, New York. It was constructed by the New York Interstate Bridge and Tunnel Commission and the New Jersey Interstate Bridge and Tunnel Commission acting as a joint Commission. The Holland Tunnel was operated for a number of years by that Commission after its completion. These two Commissions were merged with the Authority in 1930, which was thus vested by the States of New York and New Jersey with the control, operation, and maintenance of the tunnel (R. 144). It was operated from the time of its acquisition by the Authority at a net income, after deducting interest on the funded debt, as follows: 5

1931	\$3, 031, 987. 80
1933	2, 605, 076, 96
4//8/	2, 440, 987, 15

In 1937 the net income was \$3,762,798.65 (1937 Report, pp. 31, 59).

As in the case of the George Washington, Bayonne, and Arthur Kill bridges, the operation of the Holland Tunnel by the Authority is in direct

⁵ The data are taken from the Annual Reports: 1931, p. 74; 1932, p. 74; 1933, p. 76.

competition with privately owned ferries across the Hudson River and has compelled the private ferries to reduce their toll charges and revenues (R. 174, 175–176).

The Lincoln Tunnel. This is an interstate vehicular tunnel from Weehawken, New Jersey, to 38th Street, New York City. Construction was commenced in 1934; the first tube was opened on December 22, 1937, and the second will be completed in 1940. The estimated cost of the first tube was \$37,500,000; the total cost will be about \$82,500,000 ° (R. 146; 1937 Report, pp. 28–29, 43). For the ten days of 1937 in which the single tube was in operation, the tunnel had a gross income of \$38,246.25, operating expenses of \$19,519.99, and, after deducting interest, a net deficit of \$16,666.41 (1937 Report, p. 33).

This tunnel also competes with privately owned ferries and will result in a loss of revenues to these ferries (R. 174, 175–176).

As to all bridges and tunnels, the Port Authority maintains a uniformed police force by authorization of the states (R. 26). The Authority has

Respondents emphasize that the Federal Public Works Administration contracted to purchase \$29,100,000 of the Port Authority bonds issued to finance this tunnel after the Administrator "insisted upon being furnished with opinion of bond counsel of his own choosing" that the bonds were tax-exempt (Br. in Opp. 5). The Board found that the Administration "required and received the opinion of the Port Authority's general counsel that its notes were exempt from state and federal taxation" (R. 27).

sought to increase the use of these facilities by advertising in magazines, trade journals, and public places (Ex. S).

2. INTERSTATE BUS LINE

Since March 1, 1931, and through the taxable years in issue, the Authority has owned and operated with its own personnel an interstate bus line from Elizabeth, New Jersey, Port Richmond, Staten Island, and New York, over the Goethals Bridge (1934 Report, pp. 38, 39). The bus operation was commenced in 1931. Its operating deficit and surplus through the taxable years, and including 1937, have been as follows (1937 Report, p. 40):

****		L. Tol.
1831	deficit	\$9,000.25
1022	deficit	60, 000. 20
		3, 747, 60
1933	deficit	
		1, 749, 81
1937	surplus	604, 47

3. COMMERCE BUILDING AND INLAND TERMINAL NO. 1

As a part of the Port Authority's plan to coordinate transportation facilities and to reduce congestion, it has long planned to build a system of inland freight terminals: The Port Authority Commerce Building and Inland Terminal No. 1 was erected in 1932. No other freight terminal has been constructed. The building covers an entire block in New York City and is fifteen stories in height (R. 27–28, 151, 166). Thirteen floors of the building are devoted to commercial purposes. The street level floor and the basement are devoted to the purpose of the Inland Terminal and one floor,

the second, has been devoted to exhibit purposes (R. 166). A portion of the street level floor is used as store area devoted to the conveniences of the building, on which are located a barber shop, a beauty shop, a cafeteria, a United States post office, and a bank, all of which are operated by commercial concerns except the United States post office, and all pay rents to the Authority for the space which they occupy (R. 166). The space in the Commerce Building is divided as follows (1930 Report, p. 44; R. 166):

	Square feet
Office space	152, 940
Manufacture and loft space	1, 842, 000
Freight terminal purposes	282, 650
Stores	112, 260

The upper floors of this building are constructed in such manner as to be suitable for rental and occupancy for manufacturing, office, and industrial business uses (R. 151). The Authority, in the operation of the Commerce Building and Inland Terminal No. 1, through rental agents, solicited and procured tenants for the building (R. 166-167). The building is 95 per cent rented (R. 201). Authority has carried on an active and extensive campaign in advertising the building in order to secure tenants (Ex. Q), in which it represented that while the building was designed primarily for industrial uses, it also had the advantages of an upto-date office building (Exs. Q, P, A, N; R. 170-172). In the operation of the building the Authority comes into direct competition with the operation of privately owned buildings (R. 169). Revenue derived from the non-terminal portion of the building annually produces more income than that portion of the building devoted to the Authority's uses (R. 166).

The building has no physical connection with any railroad facilities, nor with any dock, pier, wharf, or other marine facilities. All of the freight, both incoming and outgoing, is handled by trucks (R. 171). The basement of a large portion of this building was leased to eight railroads for use as a transfer terminal for a period of five years with options to renew the leases for nine additional five-year periods. The basement of the building is occupied and used by the Railway Express Agency (R. 182-183). During the taxable years the Terminal operated at only a small fraction of its capacity of 680,000 tons (R. 166, 182), handling between fifty and seventy thousand tons a year (R. 182). In 1937 it handled about 75,000 tons, while the Express Agency handled about 110,000 tons. (1937 Report, p. 50.)

The Commerce Building and Inland Terminal had a gross income of \$1,235,160.82, and after paying interest and operating expenses, a net income of \$82,571.57 in 1937 (1937 Report, pp. 50, 62).

4. FINANCIAL SUMMARY

All of the income, revenues, and receipts of the Authority have been derived from the following sources: (a) Toll charges from bridges and tun-

nels; '(b) rentals of Inland Terminal No. 1, paid by the railroad carriers; (c) income received from rentals received from the upper floors of Inland Terminal No. 1; (d) rentals derived from real estate purchased but not yet devoted to uses in connection with the Comprehensive Plan; (e) interest from investments of sinking reserves and other funds; (f) revenue from operation of bus line over Goethals Bridge; (g) interest on bank balances; and (h) miscellaneous income such as rental of telephone ducts, sales of gasoline, tire changes, and advances by the States, made under the provisions of the compact and Comprehensive Plan, until the time the Port Authority became self-sustaining (R. 319).

During the taxable years in issue and in 1937 the net income from the operation of the Authority's facilities were as follows (R. 32):

* * *	1932 (74)1	1933 (75)	1937 (59)
Operating revenue (tolls, etc.)	\$6, 197, 799. 49	\$9, 755, 245. 91	\$13, 667, 463. 87
	2, 605, 076. 96	3, 112, 953. 78	5, 502, 448. 18

¹ Figures in parentheses indicate page in respective Annual Report where figures are found

The facilities constructed and operated by the Authority were financed principally by bond issues. Approximately 90% of the funds needed by the Authority were provided by such issues. The

⁷ All bridges and tunnels owned and operated by the Authority at all times up to and including the present time exact the payment of a toll charge by vehicles using them (R. 319).

financing afforded by the States of New York and New Jersey was approximately 10% of the Authority's needs and such sums as were advanced by the two States were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States (R. 31, 146–147).

The amounts derived by the Authority for its several projects by advances from the States or by bond issues are as follows:

,	States loan	Bond issue	
Arthur Kill Bridges George Washington Bridge Bayonné Bridge Holland Tunnel Commerce Building and Inland Termina	\$4, 200, 000 9, 800, 000 4, 100, 000 None	\$14, 000, 000 50, 000, 000 12, 000, 000 50, 000, 000	(R. 201, 292.) (R. 295.) (R. 298.) (1031 Annual Report, p. 57; 1932 Annual Report, p. 54.) (1031 Annual Report, p. 57; 1932 Annual Report, p. 54.)
Total	18, 100, 000 400, 000	142, 000, 000 37, 500, 000	(R. 306-307, 308.)
Total	18, 500, 000	179, 500, 000	

All of the operating revenues and tolls of the Port Authority derived from its various facilities are specifically pledged as security for the payment of its outstanding bonds and obligations, which pledge constitutes a lien upon such revenues and tolls (Ex. E, pp. 49, 73, 296; 1931 Report, pp. 57-58). The Port Authority has authority under the compact to mortgage its facilities and other property now held or to be acquired by it if it so desires (Art. VI).

C. PORT DEVELOPMENT

The operations and activities of the Port Authority during the years in question were in connection with its bridge, tunnel, and terminal facilities. It has not undertaken any projects to develop the harbor of New York in any way. It has never dredged a channel and has no dredges or facilities to do so (R. 226). It neither owns, leases, operates, nor has it constructed or improved for its own use any piers, docks, wharves, slips, or pier terminals (R. 226). It does not own or operate any tugs, barges, or marine equipment which could be used for the improvement or conduct of navigation (R. 226-227). It has established no harbor markings, buoys, lights, bells, or any other means for improving navigation, nor has it issued rules or regulations affecting navigation or commerce, except for lights in connection with its own bridges (R. 227).

The Port Authority has, however, extensively studied the marine, railway, and highway traffic problems (R. 27, 30), although its plans for an automatic underground system and for belt line railways have been abandoned or held in abeyance (R. 29, 30). It has cooperated with the State Dock Commission in its study of long piers, prepared reports on the location of free ports, advised municipalities in the district on port development, and has participated in actions before the Interstate Commerce Commission affecting the port (R. 62–

30). It cooperates with but does not supplant the efforts of states, municipalities, and agencies such as the Chamber of Commerce, Produce Exchange, and Maritime Exchange (R. 30).

The Authority has induced the Federal Government to keep the harbor clear of ice, and to promulgate regulations as to the storage of explosives. It has itself promulgated regulations concerning the storage period of freight on railroad piers (R. 30).

The Authority's Annual Reports for the taxable years in issue show that the Port Authority expended in these activities the following sums: \$189,575.35 (1932 Report, p. 86); \$138,610.75 (1933 Report, p. 84). It does not appear that any part of these funds expended by the Port Authority during the years in question was used to pay any part of the compensation of the respondents.

D. IN GENERAL

There is no provision or saving clause in the compact, comprehensive plan or any of the statutes of either State dealing with the Port Authority which provides for its final liquidation or dissolution, or for the reversion of its properties and facilities to either or both of the two States.

The Authority is expressly prohibited from levying any taxes or assessments (Ex. E, p. 43). All penalties for violation of its rules for its facilities must be enacted by the legislatures of the two States and must be enforced in the regularly established courts of the two States (Compact, Art.

XIX). All transportation facilities of the Port Authority are expressly subject to regulation by the Public Service Commission of both States to the same extent "as if such * * * facility were owned, leased, operated, or constructed by a private corporation" (Compact, Art. VIII).

All of the bridges and tunnels owned and operated by the Port Authority are interstate in character and hence are subject to the power of Congress over such commerce under the Constitution of the United States. The rules and regulations of the Port Authority as to its bridges and tunnels over navigable waters are expressly made subject to the power of Congress over such facilities (Compact, Art. XXII).

E. THE TAXPAYERS

The three taxpayers, during the taxable years in issue, were employees of the Authority (R. 160–161, 176, 224–225). The taxpayer Gerhardt was employed with the title of Industrial Consultant at a salary of \$8,500 a year and during the taxable year, 1933, received a salary of \$8,137.50 (R. 34, 160).

The taxpayer Wilson was employed as Assistant General Manager of the Authority and received a salary of \$14,625 for the taxable year, 1933 (R. 34-35, 176).

The taxpayer Mulcahy was employed by the Authority during the taxable year, 1932, as Assistant General Manager of the Authority and received a salary of \$10,950 for that year (R. 35, 224–225).

The three taxpayers are citizens of the United States and residents of New York (R. 105, 113, 121).

F. THE PROCEEDINGS BELOW

The Board of Tax Appeals held (R. 35–38) that the Authority was engaged in the performance of a sovereign function of each of the two States of New York and New Jersey and that the compensation received by the three taxpayers during the taxable years in issue was constitutionally immune from a federal income tax.

The court below, in a per curiam opinion, affirmed the decisions of the Board of Tax Appeals on the authority of Commissioner v. Ten Eyck, 76 F. (2d) 515 (C. C. A. 2d); New York ex rel. Rogers v. Graves, 299 U. S. 401; and Brush v. Commissioner, 85 F. (2d) 32 (C. C. A. 2d).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

- 1. In holding that the functions exercised by the Port of New York Authority during the years in question were governmental functions of the States of New York and New Jersey.
- 2. In failing to hold that in the operation of its several facilities the Port Authority was perform-

⁸ Petitioner is of opinion that Brush v. Commissioner, 300 U. S. 352, was intended by the court below as authority, since Brush v. Commissioner, 85 F. (2d) 32, was reversed in that case.

ing proprietary functions of the States of New York and New Jersey.

- 3. In holding that the Port Authority functioned as an agency of the States of New York and New Jersey in the exercise by those States of their sovereign powers.
- 4. In failing to hold that since the Port Authority functioned under a compact between the States of New York and New Jersey, subject at all times to the consent of the Federal Government, the Port Authority was not engaged in the performance of sovereign functions of the two States such as to be immune from taxation.
- 5. In extending the principle of tax immunity to state functions in the field of interstate commerce, supreme authority over which has been granted to the Federal Government under the Constitution.
- 6. In holding that the compensation received by the taxpayers for services rendered during the taxable years in issue as employees of the Port Authority was constitutionally immune from Federal income tax.
- 7. In affirming the decisions of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

This case presents the single question whether the federal government may constitutionally impose a tax upon the compensation of employees of the Port of New York Authority. The answer must be in the affirmative for any of three reasons. The activities of the Port Authority are proprietary in nature and are not such that federal taxation would violate "the necessary protection of the independence of the national and state governments within their respective spheres." Helvering v. Powers, 293 U. S. 214, 225.

The Port Authority is a separate corporation, holding its property and disposing of its revenues without reference to the ordinary governmental machinery of either State. It is a gigantic enterprise earning millions of dollars of annual revenues from the tolls which it charges to the general public for using its bridges and tunnels, and from the leases of space in its Commerce Building and Inland Terminal. In 1933 the Port Authority had a gross income of over \$14,000,000 and a net income, after payment of interest, of more than \$5,500,000.

In Helvering v. Powers, supra, this Court held that the operation of an elevated railway was not an essential governmental function. There is no reason to distinguish the transportation facilities there held to be taxable from those furnished by the Port Authority. Brush v. Commissioner, 300 U. S. 352, and New York ex rel. Rogers v. Graves, 299 U. S. 401, dealt with activities which owed their immunity to the fact that they were necessary auxiliaries to truly governmental functions. Neither in the Powers case nor in the case at bar

are the governmental functions of the state dependent upon the transportation activities in question.

It may be that certain of the Port Authority's activities relating to the development of the port might be said to be governmental in character, but these functions constitute an almost negligible proportion of the activities of the Port Authority.

In Helvering v. Therrell, No. 128, this Term, the Court described the activities which were exempt from taxation as those "which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution." Neither by this definition nor by the others which this Court has suggested can it be said that the employees of a great revenue producing enterprise such as the Port Authority should be exempted from a non-discriminatory federal tax.

The large volume of revenues which otherwise would be carved out of the field of federal tax sources should be decisive that the Port Authority and its employees are not to be held exempt. Helvering v. Powers, 293 U. S. 214; South Carolina v. United States, 199 U. S. 437. The Port Authority in 1937 had a gross revenue of more than \$14,000,000. These revenues are gained in competition with private enterprise, and are accompanied by a comparable decrease in the taxable income derived by the private ferries operating in competition with the bridges and tunnels of the Port Authority.

The Port Authority has no immunity from Federal taxes since it was created by and operates under a compact between the States of New York and New Jersey which was effective only because approved by an act of Congress.

The Constitution forbids the states from entering into compacts without the consent of Congress. This clause carries into the Constitution the practice of the colonies. Their formal agreements re-'quired royal approval before they became effective. This colonial practice was translated into Article 6 of the Articles of Confederation, forbidding the states to enter into any treaty or alliance without the consent of Congress. This clause, in turn, plainly was the model for the provision in the federal constitution. It results that, with the sole exception of the two-year period between the Declaration of Independence and the ratification of the Articles of Confederation, throughout the three and one-quarter centuries of American history the states and colonies have been incompetent to enter into agreements with each other except with the approval of the central authority. This, we submit, means that under the Constitution, the compact, in which the states and Congress each have participated, is something much more than state legislation alone.

The decisions of this Court indicate that the approved compact has, for many purposes, the status

of an act of Congress. Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 566; Wedding v. Meyler, 192 U. S. 573, 581. Such, too, is the conclusion which must be reached when it is considered that only the act of Congress consenting to the compact breathes life into the tentative legislation of the states which otherwise would be nugatory.

Whether or not a compact has the status of an act of Congress, the plain fact remains that Congress has participated in the legislation by which the Port Authority was created. Whatever be the description of the resulting legislation, Congress plainly had an absolute power to determine whether or not the Port Authority should be created. Indeed Article 3 of the Compact implies that Congress has authority to confer additional powers upon the Port Authority.

The reason for the rule of intergovernmental tax immunity "is found in the necessary protection of the independence of the national and state governments." Helvering v. Powers, 293 U. S. 214, 225. This reason marks the limit of the exemption. "Springing from that necessity, it does not extend beyond it." Board of Trustees v. United States, 289 U. S. 48, 59. There can, therefore, be no claim of tax immunity in connection with compensation paid by a corporation which not only has no necessary independence of Congress but which was created only by virtue of an Act of Congress.

III

The operations of the Port Authority are almost exclusively within the field of interstate commerce. Over this field Congress has paramount and plenary power. There can, therefore, be no claim that the Constitution assures the Port Authority an independence of the United States such that the taxing power may not reach it.

The compact itself subjects to the power of Congress the rules and regulations to be proposed by the Port Authority to the legislatures of the States. The Congressional consent expressly reserves the full jurisdiction of the United States. The comprehensive plan, under which the Port Authority operates, was approved by Congress by legislation which expressly reserved all authority of the United States and its officers, and expressly required that bridges, tunnels, and other structures built across navigable rivers receive the approval of the Chief of Engineers and the Secretary of War.

The interstate bridges could be constructed only with the consent of Congress. In each of the acts creating consent, the Act of March 23, 1906, was made applicable. Under this Act the location and plans of the bridges must be approved by the War Department. The Secretary of War may prescribe the toll rates and may alter or remove the bridge if it be an unreasonable obstruction to navigation.

The remaining facilities of the Port Authority are equally subject to the constitutional power of

Congress. This means that the Port Authority itself is fully subject to the Congressional power to regulate interstate commerce. *Minnesota Rate Cases*, 230 U. S. 352, 399. While the state has full constitutional power to carry on these activities, they remain at all times subject to the full power of Congress.

The income tax upon the respondents is not, of course, an exercise of the power to regulate interstate commerce, but the reason for any tax exemption is that it is necessary to protect the independence of the state or national government. An activity which, by definition, is fully subject to congressional power has no independence to be protected by the granting of tax exemption. No decision in the entire field of tax immunity could be more anomalous than one which, extending the doctrine far beyond its present outposts, held the United States incompetent to tax the respondents because of the possibility that such a tax might burden or destroy an activity as to which Congress under the commerce clause has unquestioned and plenary power to burden or destroy.

ARGUMENT

This case presents the question whether the Federal Government may constitutionally impose a tax upon the compensation of employees of the Port of New York Authority. In James v. Dravo Contracting Co., Mason v. Tax Commission, and Ryan v.

Washington, Nos. 3, 7, and 8, this Term, the Government raised the question whether any non-discriminatory tax could be considered a threat to our dual system of government, when applied to a private person whose only claim of immunity rested on the fact that he dealt with the Government. But in the three cases then under consideration, as well as in Helvering v. Therrell, No. 128, this Term, and the related cases, the Government took the position that reexamination of the cases such as Collector v. Day, 11 Wall. 113, was there unnecessary.

Similarly, we are of the view that the present cases are not such that we should ask for a reexamination of the cases which hold or assume that the preservation of our dual system of government requires that the employees or officers of the central and state governments be exempted from a nondiscriminatory tax imposed by the other sovereign. This is the case, we submit, because whatever the conclusion on that question, here: (1) the activities of the Port Authority are proprietary in character and are not an essential governmental function; (2) the Port Authority is not created by the States alone, but exists only by virtue of the Act of Congress approving the compact; and (3) the activities of the Port Authority are in interstate commerce and are subject to the paramount power of

^o Helvering v. Tunnicliffe, No. 129; McLoughlin v. Commissioner, No. 287; Helvering v. Freedman, No. 597, this Term.

Congress, so that the reason for tax immunity does not exist.

Before discussing these propositions, it should be observed that the issue before the Court is solely one of constitutional interpretation. Section 22 of the Revenue Act of 1932, here involved, contains no exemption of government salaries. Article 643 of Treasury Regulations 77, infra, as amended, provides that the compensation for services rendered to a state shall be included in gross income "unless such compensation is immune from taxation under the Constitution."

I

THE ACTIVITIES OF THE PORT AUTHORITY ARE PROPRIE-TARY IN NATURE

The basic principles applicable to this question are well settled. There is no immunity from taxation unless the compensation be given for services performed for the State in connection with activities of a nature such that federal taxation would violate "the necessary protection of the independence of the national and state govern-

The earlier Revenue Acts exempted the "compensation of all officers and employees of a state or any political subdivision thereof." (Sec. II (b), c. 16, 38 Stat. 114; Sec. 4, c. 463, 39 Stat. 756; Sec. 201 (a), c. 63, 40 Stat. 300.) However, since the Revenue Act of 1918 there has been no comparable provision, Congress having left "the constitutional question as to the authority of Congress to tax certain salaries to be settled by the courts * *." (S. Rep. No. 617, 65th Cong., 3d Sess., Pt. 1, p. 6.)

ments within their respective spheres." Helvering v. Powers, 293 U. S. 214, 225; see South Carolina v. United States, 199 U. S. 437; Ohio v. Helvering, 292 U. S. 360, 368–369. The question for decision is whether the activities of the Port Authority are such essential governmental functions.

This question cannot be answered by formula, but must be a judgment drawn from the facts and circumstances of the actual activities of the Port Authority. "By definition precisely to delimit " " " "essential governmental duties" is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances." Helvering v. Therrell, No. 128, this Term (pamph., p. 4). The circumstances of the activities of the Port Authority demonstrate, we submit, that they are predominantly proprietary in nature.

1. At the outset, it is to be noted that the Port Authority is not the states themselves. It is a separate corporation, without capital stock. It holds all of its property in its own name, and its revenues belong to it alone, subject to an unexercised power in the States to direct the disposition of sur-

¹¹ This statement is to be qualified by the fact that technical fee title to the Holland Tunnel probably vests in the States of New York and New Jersey. The Acts of 1930 (N. Y., L. 1930, c. 421, sec 5; N. J., L. 1930, c. 247, sec 5) reserve their right, title and interest to the tunnel, land and property. However, the Acts of 1931 (N. Y., L. 1931, c. 47; N. J., L., 1931, c. 4) require the Port Authority to repay to the states their contributions to the construction of the tun-

plus revenues (N. Y., L. 1931, c. 48; N. J. L. 1931, c. 5). Its commissioners are appointed by the governors of the two states, and are subject to removal by the governor or senate, but the Authority functions as an entity wholly separate from the state, and its operations are subject to no control by the executive branch of either State.

It is probable that this separate character of the Port Authority was primarily compelled by the need for joint state action (see preamble to the compact creating the Authority, infra, p. 72). But it is not without significance that its activities are considered so far removed from the traditional governmental functions of the two states that a separate corporate entity was created to perform them without reference to the normal governmental functions of either State.

2. The implications of this separate organization are more than borne out when the nature and extent of the Port Authority's activities are considered. Ignoring for the moment that small part of the activities which may be taken to be governmental in character, the Port Authority is seen to be a gigantic enterprise with millions of dollars of annual revenues, chiefly realized by what is essentially the sale of transportation service to the consuming public.

nel and, when this is done, vests in the Port Authority "the control, operation, tolls and other revenues" of the tunnel, with full power to use and to pledge the revenues for any purpose of the Authority.

The volume and distribution of these activities can best be seen from the following table, summarizing the operations for the year 1937: 12

Facility	Gross Income	Net Income * (After Payment of Interest)
Holland Tunnel. George Washington Bridge. Lincoln Tunnel. Bayonne Bridge. Arthur Kill Bridges. Inland Terminal No. 1. Other Sources.	260 959 12	\$3, 762, 798, 65 2, 009, 639, 66 1 16, 666, 41 1 298, 917, 07 1 191, 940, 61 82, 571, 57 64, 962, 39
Total	14, 050, 580. 61	5, 502, 448. 18

¹ Indicates a deficit.

This gross income of over \$14,000,000 was chiefly derived from the tolls collected from the 22,622,316 vehicles which in 1937 used the Port Authority's interstate vehicular crossings (1937 Report, p. 62). The net income of over \$5,500,000 was used wholly to built up debt retirement and other reserves.¹³

It needs no argument to show that here we have an enterprise which is earning profits on a grand scale. True, the profits are being used to accumu-

Total______ 5, 502, 448, 18

¹² The table is derived from the Seventeenth Annual Report of the Port of New York Authority, December 31, 1937, pp. 42, 59-62.

late reserves for debt retirement and for new construction. True, the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. Neither of these circumstances alters the plain fact that the Authority is conducting a business enterprise—a business obviously "affected with a public interest" but one which nonetheless earns and accumulates handsome profits from its transactions with the general public.

Some of these activities respondents hardly will deny to be proprietary in nature. The operation of a bus line (supra, p. 13) cannot, under Helvering v. Powers, 293 U.S. 214, be thought to be governmental in character. The Commerce Building and Inland Terminal No. 1, at least as to the thirteen floors devoted to commercial leases, which are solicited by realtors and advertising (supra, p. 14), seems equally clearly to be of a proprietary charac-The two floors devoted to the purpose of a freight terminal and to the use as a Railway Express Agency station are more closely related to the basic purpose of relieving traffic congestion in the district. But they, July as much as the upper floors, constitute business space leased to private persons for an annual rental, the Port Authority operating in this regard just as a private landlord.

The most serious question arises with respect to the great bridges and tunnels operated by the Port Authority. They produce large revenues and profits. The Authority has made efforts to increase the traffic on its bridges and tunnels by advertising in magazines, trade journals, and public places (Ex. S). On the other hand, it may be admitted that a basic purpose of the Port Authority's creation and of the operation of the bridges and tunnels is not to earn profits but to facilitate the flow of traffic through the district.

The Government submits that the question of tax immunity must turn upon the actual operations and not the underlying purpose of the activity. The legislature when it incorporates a privately owned public utility does so in order that its citizens may have transportation, light, or fuel. This public interest in the results of the utility's operations does not give to it the immunity of the sov-Similarly, when the state or city itself ereign. operates a transportation system, the basic purpose is not to produce revenue but to provide for the transportation needs of the community. But since "the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is distinct from the usual governmental functions," the business does not have immunity from taxation. Helvering v. Powers, 293 U.S. 214, 227.

In Helvering v. Powers this Court unequivocally held that the operation of an elevated railway, whether temporarily or in perpetuity, was not an essential governmental function. There is no ground whatever to distinguish the transportation facilities furnished passengers in the *Powers* case and the transportation facilities furnished vehicles by the Port Authority. In each case the service is of a nature such that it has been and is being furnished alternatively by a government or by private persons. In each case the transportation service is designed to fill a public need. In each case large revenues are realized by transactions with the general public.

Respondents in the earlier proceedings in this Court did not attempt to distinguish the Powers case, but stated merely that Brush v. Commissioner, 300 U. S. 352, and New York ex rel. Rogers v. Graves, 299 U. S. 401, should have dissipated the Government's misconceptions as to the effect of the Powers decision (Br. in Opp. 22). If this means that the Powers case has in any way been overruled or modified, the contention is baseless. The Brush opinion stated (p. 373) merely that the Powers case was not in point. The Rogers opinion did not even cite the Powers case. The Powers case was, on the other hand, definitely reaffirmed on February 28, 1938, when this Court in Helvering v. Therrell, No. 128, held that persons employed by the states and engaged in the liquidation of insolvent banks and insurance companies were subject to the federal income tax. The Court said (pamph. p. 5):

Helvering v. Powers, supra, ruled that the compensation of members of the Board of Trustees of the Boston Elevated Railway

Company was subject to the federal income tax notwithstanding they were appointed by the Governor of the State, confirmed by the Council, and endowed with large powers to regulate and fix fares, etc. "The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity."

The cases last referred to strikingly illustrate the outcome of efforts here to apply the recognized doctrine in respect of taxing State agencies. According to them and others of like nature due weight, we are unable to conclude that the Commissioner erred * * *

Neither the Brush nor the Rogers case deals with an activity primarily consisting in furnishing transportation to the general public, as was the question presented in the Powers case and is in cases at bar. In the Brush case the activity of supplying water was such that had it been abandoned, "in a very real sense * * * the city itself would then disappear." The maintenance of an adequate water supply was held to be a "necessary auxiliary" of almost all of the city's governmental activities, "and, therefore, partakes of their nature" (p. 371). The Rogers case held that the Panama Railroad Company, operating a railroad, steamships, two hotels, and a dairy, functioned chiefly as an adjunct to the management and operation of the Panama Canal (p. 404). The management and operation of the Canal are "governmental functions," authorized by laws "well within the constitutional power of Congress to provide for the national defense and to regulate commerce. * * * Such being the status of the Canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature" (p. 406). Each of the cases thus dealt with activities which owed their immunity to the fact that they were necessary auxiliaries to truly governmental functions. Such is not the case here; the governmental functions of neither state are dependent upon the transportation activities of the Port Authority as a necessary auxiliary.

3. We have so far ignored the inconsiderable portion of the Port Authority's activities which deal with the development of the port. These have been summarized (supra, pp. 18–19) and may be said chiefly to consist of study of traffic problems, planning traffic flow, and consultation and advocacy with respect to the traffic and maritime interests of the port district, and one regulation relating to the storage period of freight.

It is unnecessary to decide which of these activities is governmental in nature. Even if it be assumed that they all involve the exercise of essential governmental functions, the fact remains that they constitute an almost negligible portion of the activities of the Port Authority. During the tax-

able years in question the total expenditure of the Port Authority on these activities was, in 1932, only \$189,575.35,1 and during 1933 was only \$138,-610.75.1 This means that of the gross income de-

¹⁴ 1932 Annual Report, p. 86; Table No. 22:

Expenditures for effectuation of comprehensive plan year ended December 31, 1932

December 31, 1932	
Rolt Lines Committee	Amount
Belt Lines, General	\$1,630.59
Delt Line No. 1	22, 200, 68
Belt Line No. 13, General	1,097.68
Channels, Bridges, and Anchorages	15, 089, 73
Food Distribution, Marketing Research Council	1, 082, 36
Food Receiving Terminals and Food Distribution	708. 75
Development Work, Port District	93, 403, 06
I. C. C. and State Commission Cases	13, 287, 56
Inland Terminals and Movement of Freight by Motor	
Trucks	8, 657. 62
Jersey City Marine Terminal	5, 500, 00
Suburban Transit	13, 470, 75
Terminal Operations, General	5, 644, 73
rance said Regulations	7, 762, 49
Brooklyn-New Jersey Ferry	39. 35
. Total	189, 575. 35
15 1933 Annual Report n 84, Table N 17	

15 1933 Annual Report, p. 84; Table No. 17:

Expenditures for effectuation of comprehensive plan year ended December 31, 1933

Project	Amoun	
Belt Lines, General	9000	
Belt Line No. 1	- \$682	
Belt Line No. 13 Concret	1, 962	. 02
Belt Line No. 13, General	1,671.	. 66
Channels, Bridges, and Anchorages	7, 179.	47.
Consolidated Lighterage and Carfloatage Operations	998.	45
Food receiving Terminals and Food Distribution	908.	44
Development Work, Port District	74, 652.	85
I. C. C. and State Commission Cases	11, 574.	51
amand terminals and Movement of Freight by Motor		
Trucks.	24, 206.	27
Suburban Transit	1; 393.	32
Terminal Operations, General	4, 819.	56
rates and Regulations.	8, 561.	47
· Total		-

\$138, 610, 75

rived by the Port Authority, only 1.8 percent went for these port-development activities in 1932, and only 1.3 percent in 1933.16 It seems quite plain that the Port Authority cannot acquire immunity merely because this small part of its activities may be said to be governmental in character. Its great bridges and tunnels, and its terminal and commerce building, can in no sense be said to be a "necessary auxiliary" of these minor activities. Indeed, so far as these relate to planning traffic flow and port development, they amount to little more than the planning undertaken by any large enterprise possessed of a profitable and expanding business.

4. The appeal to history does not lead to any necessarily certain result. This is because, throughout the history of our country, bridges have been built and operated both by private and by governmental organizations. In result the Government cannot argue that the Port Authority has entered into a field traditionally reserved to private enterprise. Nor can the respondents argue that the large

¹⁶ In 1932 the gross income was \$10,644,702.67 and in 1933 it was \$10,371,374.08. If other measures are useful, it may be noted that the expenditures on port development in 1932 were 2.9 per cent of the gross expenditures of \$6,611-693.56 and 8.9 per cent of the gross expenditures, less bond interest, of \$2,137,318.54. In 1933 they were 2.0 per cent of the gross expenditures of \$7,021,684.43 and 6.5 per cent of the gross expenditures, less bond interest, of \$2,023,101.09. (Figures derived from income data in 1932 Annual Report, p. 73; 1933 Appeal Report, p. 75.)

revenues derived by the Port Authority are those which arise from the normal and historical operations of government alone.

But measured against the standards which have been suggested by this Court, this historical background becomes somewhat more illuminating. The governmental functions which have been said to warrant tax exemption are those which are strictly governmental (South Carolina v. United States, 199 U. S. 437, 461), essential governmental functions Flint v. Stone-Tracy Co., 220 U.S. 107, 172; .. Brush v. Commissioner, 300 U.S. 352, 362), usual governmental functions (Helvering v. Powers, 293 U. S. 214, 225) and traditional governmental functions (United States v. California, 297 U. S. 175, 185). The most recent description of exempt functions is that given in Helvering v. Therrell, No. 128, this Term, where the Court said (pamph., p. 4) that "essential government duties" mean:

those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

Certainly, the construction and operation of bridges cannot be said to be "strictly" governmental. Since the Port Authority has operated its bridges and tunnels for only a decade or less, this activity hardly can be said to be "essential" to the independence of New York or New Jersey. And, while the states have "traditionally" built bridges, it

would not be argued that this activity is "traditionally" or "usually" governmental in the sense that private organizations have not undertaken it. And by no means can it be thought that the framers would have considered the states unable "adequately to function under the form of government guaranteed by the Constitution" if the employees of a great revenue-producing enterprise such as the Port Authority were subjected to income taxation.

5. The essentially proprietary nature of the activities of the Port Authority is illustrated by the terms of the port compact itself. Article 8 provides:

ART. 8: Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each State, respectively, shall apply to railroads and to any transportation, terminal, or other facility owned, operated, leased, or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation.

In addition, as developed more fully below, the location and structure of the bridges, as well as the tolls charged, are subject to the jurisdiction of the Secretary of War under the General Bridge Law of 1906, *infra*, pp. 59–60.

A corporation which is thus subjected to the regulatory powers of the national government, and which is subjected to the state commissions as fully as though the facilities were privately owned and operated, must carry a heavy burden to show that it is entitled to tax immunity because its activities are "essential governmental functions." This burden, we submit, is not met by a legislative declaration in 1931 that the Port Authority "shall be regarded as performing an essential governmental function and shall be required to pay no taxes or assessments" on its property (N. Y., L. 2, 1931, c. 47, Sec. 14; N. J., L. 1931, c. 4, Sec. 14). The implications of the Federal Constitution cannot be shaped by declarations of the legislatures of the states.

6. The nature of the activities of the Port Authority is such that the decision must be governed by *Helvering* v. *Powers*, *supra*. But perhaps the most decisive element of the case is the large volume of revenues which would be carved out of the field of federal revenue sources if the Port Authority and its employees were held exempt from federal taxation.

Few principles in the field of intergovernmental tax immunity are better settled than that which denies to the states the power to claim tax exemption for activities which would normally be within the scope of the federal taxing power. In South Carolina v. United States, 199 U. S. 437, the Court

placed its decision squarely on the ground that to grant tax immunity to the state liquor business would be to curtail the ordinary sources of federal revenue. It said (at p. 455):

Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues.

And in Helvering v. Powers, supra, p. 225, the Court defined the controlling limitation upon the claim for tax immunity as the principle that "the State cannot withdraw sources of revenue from the Federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." This Court has repeatedly stressed the necessity that exemption not be granted from nondiscriminatory taxation where the effect would be to cripple the power to tax. Metcalf and Eddy v. Mitchell, 269 U. S. 514, 523-524; Willcuts v. Bunn, 282 U. S. 216, 225; Susquehanna Co. v. State Tax Commission (No. 1), 283 U.S. 291, 294; United States v. California, 297 U. S. 175, 184-185; James v. Dravo Contracting Co., No. 3, this Term (pamph. p. 11). Indeed, in Helvering v. Mountain Producers Corp., No. 600, this Term, this Court overruled its decisions in Gillespie v. Oklahoma, 257 U. S. 501, and Burnett v. Coronado Oil and Gas Co., 285 U.S. 393, because, in considerable part, alongside of the principle of tax immunity was the correlative and "competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled" by undue extensions of constitutional exemption.

Rarely has a case been presented to this Court which more strikingly illustrated the necessity that the federal tax sources should be maintained. During the taxable years in question, the gross revenues of the Port Authority amounted to \$10,-270,699.82 in 1932 and to \$10,134,638.21 in 1933; by 1937 these revenues had reached the total of \$14,050,580.61 (supra, p. 33). As new facilities are opened, the revenues may be expected to increase largely. The volume of the activities of this single Port Authority indicates how serious would be the impact upon the revenues of the Federal Government of a decision of exemption from taxation.

These revenues are gained in competition with private enterprise. It has been stipulated that "the business of the ferry companies operating between the west and east sides of the Hudson River have diminished, and that * * * they will probably continue to diminish * * *. We will freely concede that the furnishing of the vehicular tunnel under the Hudson River, and bridges over the Hudson River, may ultimately result in a complete wiping out of the ferries * * *." (R. 174.) These private ferries were, of course, subject to Federal taxation. While it is probable that one of the

effects of the Port Authority facilities has been to stimulate interstate vehicular traffic, it cannot be denied that a large proportion of its revenues have been drained off from those formerly received by the ferry companies. The record shows that all of these competing ferry companies have been forced to reduce their fares, and that one has been forced out of business entirely (supra, pp. 9–12).¹⁷

7. It is recognized that the Circuit Courts of Appeals for the Second and for the Ninth Circuits have indicated a contrary conclusion. Commissioner v. Ten Eyck, 76 F. (2d) 515 (C. C. A. 2nd) (Albany Port District); Commissioner v. Harlan, 80 F. (2d) 660 (C. C. A. 9th) (Golden Gate Bridge and Highway District). Each of these cases may be distinguished on their facts. But the opinions in those cases would seem to cover the present case as well. To that extent, they depart from the guiding principles which have been laid down by this Court. 18

18 Four other cases in the Board and the lower courts, relating to the taxation of compensation paid employees of

Authority is immune from taxation would result in the loss of the substantial revenues formerly derived from the competing private ferries. They advance, however, the novel argument that the effect of the Port Authority activities "necessarily forwards the general prosperity—and so directly increases federal tax returns (Br. in Opp. 37). This principle, if accepted, would seem to eliminate tax revenues entirely, at least when a government claims immunity for any of its activities. Presumably any productive activity which produces income forwards the general prosperity.

The separate organization of the Port Authority, the fact that its revenues are derived from the sale of transportation service to the general public in competition with private enterprise, and the necessity of maintaining the sources of federal revenue, alike indicate that the Port Authority is not engaged in an essential governmental function. Certainly, to hold the Authority and its employees subject to federal taxation would not serve to destroy that independence of the States of New York and New Jersey which is essential to the maintenance of our dual system of government.

II

THE STATES ALONE

The Port Authority was created by and operates under a compact between the States of New York and New Jersey, which was approved by an Act of Congress (infra, p. 71). Without this approval of Congress the compact would have been inoperative and the Port Authority would not have been created. Both the nature of an interstate compact and the terms of the compact in question demonstrate that the Port Authority cannot claim any immunity from federal taxation which might at-

more or less analogous organizations, by decision or implication tend to support respondents. Wait v. Commissioner, 35 B. T. A. 359; Platt v. Commissioner, 35 B. T. A. 472; Boomer v. Glenn, 21 F. Supp. 766 (Jan. 14, 1938); Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920 (C. C. A. 1st).

tach to its operations were they undertaken by the states themselves.¹⁹

1. Article 1, Section 10, Clause 3 of the Constitution provides that "no State shall, without the consent of Congress, * * enter into any agreement or compact with another state." The effect of this provision is, at this point, not wholly clear. But the status of an approved compact seems, for many purposes, most accurately to be described as that of an act of Congress.

The compact clause can be understood only in its historical setting.²⁰ For more than 325 years there have been colonial or state governments in America. During this long period the colonies or states have been able to enter into agreements without the approval of a central authority for less than

eral in Hinderlider v. La Plata River and Cherry Creek Ditch Co., No. 437, this Term, also sets forth the view of the government that a compact approved by Congress has the status of an act of Congress. Our argument on the nature of interstate compacts is largely repetitive of the discussion there contained. We repeat it for the possible convenience of the Court. There is, of course, no basis for respondent's suggestion (Br. in Opp. 33) that the memorandum filed on behalf of the United States in Hinderlider case means that "the Attorney General retired from the broader position previously taken by him." (See pp. 5-6 of the second memorandum.)

²⁰ The clause was not discussed in the Constitutional Convention. Each of the successive drafts contains language substantially identical with the compact clause as finally enacted. Farrand, Records of the Federal Convention, II, 169, 187, 577, 597, 626, 657.

two years, the period between the Declaration of Independence on July 4, 1776, and the ratification of the Articles of Confederation on June 26, 1778.

The formal agreements between the American colonies seem to have been confined to those relating to boundary suits. As such, they involved the construction or application of royal charters. It was, therefore, the natural that agreements between two colonies should be subject to royal approval before they became effective. Accordingly, the common practice in the case of boundary disputes was to refer the agreement to the King for his approval. Thus, the Massachusetts Act of April 19, 1754, ch. 367, 15 Mass. Prov. Laws 157, appointed commissioners to agree upon the New York boundary line, to be followed by acceptance by the legislatures "in order humbly to present the same, after their accepting it, to be approved & ratified by his Majesty;

²¹ The New York Act of June 6, 1767, N. Y. Col. Laws 948, designates Commissioners to agree with those of Massachusetts as to the proper boundary and makes no mention of a subsequent approval of the King. This may have been implicitly understood, or subsequent legislation may have been intended to take care of this. Thirteen years before, on December 7, 1754, the Assembly had petitioned for a royal commission to settle another boundary "altho' his most Gracious Majesty hath the Sole and Absolute Right of fixing and Determining Such Line of Jurisdiction." 3 N. Y. Col. Laws 1036. The records of five colonial boundary disputes, summarized in Frankfurter and Landis, A Study in Interstate Adjustments, 34 Yale Law J. 685, 730-732, which apparently contain no approval of the agreement by the King, are possibly incomplete.

or otherwise to agree on a line to be immediately submitted to his Majesty for his Royal Approbation & Confirmation as the Commissioners mutually chosen shall judge best." Other colonial acts are to the same effect. The fact that the alternative mode of procedure was by the direct appointment of a royal commission, followed by an appeal to the King in Privy Council, points the fact that the disputes were considered subject to decision by the King alone. Lord Mansfield, when Attorney General Murray, is quoted in South Australia v. Victoria, 12 C. L. R. 667, 704, as having stated that the Massachusetts-Connecticut boundary agreement would be binding on the King only if he approved it (Frankfurter and Landis, A Study in

York-New Jersey), subsequently "repealed by the King," Livingston & Smith, ch. 48, N. Y. Laws, 1752–1762, vol. 2; Act of Sept. 6, 1737, ch. 113, 12 Mass. Prov. Laws 407 (Massachusetts-New Hampshire); Act of July 28, 1741, ch. 27, 13 Mass. Prov. Laws 24 (Massachusetts-Rhode Island); Act of August 1, 1740, 4 R. I. Col. Rec. 586 (same). Batchellor, Laws of N. H., vol. 2, App. B, pp. 768–794, contains the official record of the Massachusetts-New Hampshire

dispute.

²² The Act of April 11, 1729, ch. 281, 11 Mass. Prov. Laws 396, appointing commissioners to agree upon the New Hampshire line provided that, after acceptance by the legislatures, "His Majesty be humbly addressed by both Governments for his Royal Approbation." The Act of Oct. 13, 1730, ch. 134, 11 Mass. Prov. Laws 517, relating to the same boundary dispute, directed the Commissioners to settle the line "that it may be indisputable in all times to come, Upon its receiving the Royal Sanction." See also Frankfurter and Landis, supra, p. 692.

Interstate Adjustments, 34 Yale Law Journal 685, 692, 693). It thus seems that the colonial agreements were in effect royal decrees.²⁴

This colonial practice, forbidding the separate colonies to make agreements between themselves without royal approval was, in the Articles of Confederation, translated into a provision forbidding the separate states to make agreements among themselves.²⁵ Article 6 provides in part:

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

This clause obviously provided the model for the provision in the Federal Constitution, and the constitutional prohibition must accordingly be read in the light of the long history of colonial agreements, the status of which seems to have been continued in the Articles of Confederation.

The decisions of this Court indicate that a compact between States which has been approved by Congress will for many purposes be viewed as an Act of Congress. A compact to which Congress has

²⁴ Such, of course, is the theoretical status of an act of Parliament. Blackstone, Commentaries, I, *85; Anson, Law and Custom of the Constitution, p. 34.

²⁵ There was no discussion of Article 6 relevant to this question. See 9 Journ. Cont. Cong. 826, 827, 833.

consented, "by the sanction of Congress, has become a law of the Union," such that this Court may enforce its terms. Pennsylvania v. The Wheeling Bridge Co., 13 How, 518, 566; Missouri v. Illinois. 200 U.S. 496, 519. Similarly, Congress itself may legislate for the enforcement of a compact which it has approved. Virginia v. West Virginia, 246 U.S. 565, 601-603; Pennsylvania v. The Wheeling Bridge Co., supra, 566. This Court has held, after an earlier decision to the contrary,26 that a compact to which Congress has consented is "a statute of the United States" within the meaning of Section 25 of the Judiciary Act, as amended, giving this Court appellate jurisdiction over cases in which the highest state court has denied a right claimed under such a statute. Wedding v. Meyler, 192 U. S. 573, 581.

It should be noted that this Court has held that the decisions of a state court under a compact are

²⁶ In People v. Central Railroad, 12 Wall, 455, 456, there was an unequivocal decision that rights claimed under a compact approved by Congress were not claimed under a statute of the United States such as to give this Court jurisdiction. See also Hamburg American Steamship Co. v. Grube, 196 U. S. 407, 413, where a frivolous claim under a compact approved by Congress was said to raise no Federal question. The Central Railroad case has never since been cited and seems necessarily to have been overruled by the Wedding case. The possible distinction that the Wedding case is based on a Congressional consent to the admission of a State under Article IV, Section 3, clause 1, is unavailing, since the rights claimed under the agreement between Virginia and Kentucky were based on an agreement which this Court has treated as a compact between the States. Green v. Biddle, 8 Wheat. 1, 85-87.

not binding on this Court, Marlatt v. Silk, 11 Pet. 1, 22–23, and that a compact is binding on the signatory States, Rhode Island v. Massachusetts, 12 Pet. 657, 725, such that a state cannot withdraw its consent to a compact which has sufficiently been consented to by Congress, Virginia v. West Virginia, 11 Wall. 39, cf. Poole v. Fleeger, 11 Pet. 185, 209–211. Not since Green v. Biddle, 8 Wheat. 1, 91–93, has this result, placing a compact above ordinary state law, been placed on the contracts clause of the Constitution. Though cf. Virginia v. West Virginia, 220 U. S. 1, 28–29.

Certainly, it requires the act of Congress to breathe life into the agreement between the states. Before the congressional consent, the proposed compact is wholly nugatory. If congressional action is required to convert what may be said to be tentative or proposed legislation into actual legislation, the resulting act seems more accurately to be called an act of Congress than that of the states alone.

2. Whether or not the Court will agree with us that a compact which has been approved by Congress has the status of an act of Congress, the fact remains that Congress has participated in the legislation by which the Port Authority was created. The compact is plainly something more than joint legislation of the two States. Whether it be called an act of Congress or merely legislation under the authority of the United States is immaterial in the present connection. In either event, or under any

other name, the compact has life only through the participation of Congress. By the express direction of the Constitution, Congress is given absolute and uncontrolled power to determine whether or not the compact shall be effective. The Port Authority was, accordingly, created by a legislative process in which the United States was at least as necessary as were the States of New York and New Jersey. There can, therefore, be no claim that the Constitution by implication gives to the Port Authority immunity from federal taxation in order to maintain its necessary independence of the United States.

The present problem is not essentially different from that which has already been settled by the decisions of this Court. Corporations have occasionally found it useful or necessary to be incorporated by several states. It is established that each of the incorporating states has power to tax the resulting corporation as fully as though it were a purely domestic corporation, and without limitation by the constitutional requirements applicable to corporations not organized by the taxing state. Kansas City R. R. Co. v. Stiles, 242 U. S. 111, 116–117; Ashley v. Ryan, 153 U. S. 436, 442; compare Louisville & Nashville Railroad Co. v. Kentucky, 161 U. S. 677, 703.

So, too, since the Port Authority is incorporated under a compact requiring the legislation of the two States and of Congress, each of legislatures may be supposed to have the powers of taxation which are applicable to their own corporations.

- 3. The power of Congress over the Port Authority is recognized by the provisions of the compact itself. It provides (infra, pp. 73) in Article III that the Authority shall have "such other and additional powers as shall be conferred upon it by the legislature of either state, concurred in by the legislature of the other, or by act or acts of Congress " " " [italics added]. And the Act of Congress approving the compact provides in Section 2 (infra, p. 78), that "the right to alter, amend, or repeal this resolution is hereby expressly reserved."
- 4. This Court has many times announced the guiding principles which must apply when an immunity from Federal taxation is claimed. The reason for the rule "is found in the necessary protection of the independence of the national and state governments." Helvering v. Powers, 293 U. S. 214, 225. Since this is the reason for the doctrine of inter-governmental tax immunity, it also marks the limits of the exemption. "Springing from that necessity, it does not extend beyond it." Board of Trustees v. United States, 289 U. S. 48, 59.27

²⁷ The Court has frequently declared, in similar terms, that the scope of the exemption is limited by its reasons.

²⁶ The principle has similarly been formulated in National Bank v. Commonwealth, 9 Wall. 353, 362; Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523; Willcuts v. Bunn, 282 U. S. 216, 225; Educational Films Corp. v. Ward, 282 U. S. 379, 391; Indian Territory Oil Co. v. Board, 288 U. S. 325, 328; Board of Trustees v. United States, 289 U. S. 48, 59.

If the rule of tax immunity is to be limited to its reasons, it has no application to these respondents. Their compensation is derived from a corporation created by the joint legislation not only of the States of New York and New Jersey but also of the Congress of the United States. By hypothesis, there can be no question of maintaining the necessary independence of the states from the federal government. Accordingly, the Port Authority cannot assert an independence of Congress, which participated in its creation, and cannot claim a constitutional immunity from taxes imposed by Congress.²⁸

Respondents' claim to immunity, of course, rises no higher than that of the Port Authority itself. Helvering v. Powers, supra, 227.

Indian Territory Oil Co. v. Board, supra, 328; Helvering v. Powers, supra, 225; Willcuts v. Bunn, supra, 225; Educational Film Corp. v. Ward, supra, 392; Fox Films Corp. v. Doyal, 286 U. S. 123, 128.

²⁸ Respondents (Br. in Opp. 33) meet this argument by reliance upon the concept of sovereignty. Whatever be the contours of this concept, it is evident that they do not embrace an organization whose existence stems from Congress as well as the states. To the extent that the participation of Congress in compacts impairs state sovereignty which otherwise would exist, this impairment occurred, or was continued, when the Constitution was adopted.

III

THE PORT AUTHORITY OPERATES IN INTERSTATE COM-MERCE, SUBJECT TO THE PARAMOUNT POWER OF CONGRESS

It has been shown that the activities of the Port Authority are predominantly proprietary rather than governmental in character. It has been shown that the circumstances of its creation are such that it cannot assert an immunity from taxation based upon the necessity of maintaining its independence from the Federal Government. There is, finally, a third reason which compels a reversal of the judgment below. The operations of the Port Authority are almost exclusively within the field of interstate commerce. Over this field Congress has paramount and plenary power. The activities of the Port Authority are carried on subject to this power. There can, therefore, be no claim that the Constitution assures the Port Authority an independence of the United States such that even its employees are immune from a nondiscriminatory income tax.

1. The terms of the compact, and of the resolutions by which Congress has consented to it and to the comprehensive plan, each indicate that Congress has in no sense abdicated its authority over the field of interstate commerce in which the Port Authority operates.

The compact in Article XVIII gives to the Port Authority the power to initiate legislation by the two states. But this power is qualified by recognition of the congressional authority. The Article provides:

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby. [Italics added.]

The Act of Congress granting consent to the compact (infra, p. 71) contains the express proviso "that nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

The comprehensive plan, under which the Port Authority operates, was approved by Act of Congress on July 1, 1922 (c. 277, 42 Stat. 822). The Joint Resolution approving the plan provides:

That, subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution, the consent of Congress is hereby given to the supplemental agreement between the States of New York and New Jersey * * * covering the comprehensive plan for the development of the port of New York * * *

Lest there be doubt, the resolution closes with two provisos which make clear that the full authority of Congress is reserved over the interstate operations of the Port Authority. These read:

Provided, That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement; Provided further, That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War.

Finally, in Section 2 of the resolution Congress provided "that the right to alter, amend, or repeal this resolution is hereby expressly reserved."

2. The interstate bridges could be constructed only with the consent of Congress. Act of March 3, 1899, infra, p. 66. In each of the three Acts granting consent to the construction by the Port Authority of the George Washington, Arthur Kill, and Bayonne bridges, Congress expressly provided that the bridges should be subject to the Act of March 23, 1906, regulating the construction of

bridges over navigable waters. And in each Act Congress conditioned its grant of authority upon the requirement that the bridges be commenced within three years and finished within six (or seven) years. Acts of March 2, 1925, chs. 389–391, 43 Stat. 1094–1095.

Under the terms of the Act of March 23, 1906, infra, pp. 68, the Secretary of War and the Chief of Engineers must approve the location and the plans of the bridges (sec. 1). The Secretary of War may at any time prescribe the toll rates (Sec. 5). The Secretary may, after notice and hearing, direct the alteration of the bridge if it be found to be an unreasonable obstruction to navigation, or its removal if the lawful orders of the Secretary or the Chief of Engineers are disobeyed (secs. 4, 5). The Authority must maintain such lights and signals on its bridges as the Secretary of Commerce shall direct (sec. 4). Indeed, under Section 18 of the Act of March 3, 1899 (infra, p. 66), Congress, through the Secretary of War, could order the alteration or removal of the Port Authority bridges whenever they obstructed navigation, even though no such power had been reserved by the act granting consent to their erection. Union Bridge Co. v. United States, 204 U.S. 364; Louisville Bridge Co. v. United States, 242 U. S. 409, 421. See also, United States v. Chandler-Dunbar Co., 229 U. S. 53; Greenleaf Lumber Co. v. Garrison, 237 U. S. 251.

It seems quite plain that the bridges of the Port Authority are completely subject to the paramount. Federal authority. Similarly, its interstate tunnels are equally subject to the constitutional power of Congress. West Chicago Railroad v. Chicago, 201 U. S. 506, 527-528. There can be no doubt that the bus line operated by the Authority over its interstate bridges, and its terminal facilities so far as used for interstate shipments, are fully subject to whatever appropriate control Congress should think necessary in its regulation of interstate commerce. The functions of the Port Authority in planning the development of the Port of New York are, of course, an activity equally subject to the power of Congress. Wisconsin v. Duluth, 96 U. S. 379, 387; Philadelphia Co. v. Stimson, 223 U. S. 605, 634-638.

It results that the Port Authority, in operating so exclusively in the field of interstate commerce, is at all times subject to the paramount power of Congress. "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on." Minnesota Rate Cases, 230 U. S. 352, 399. When this authority was exercised by granting to the Port Authority permission to build its interstate bridges, there was reserved, as we have shown, a continuing power of control to Congress. This Court said of a similar authorization in Bridge Company v. United States, 105 U. S. 470, 481–482:

What the company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce.

* * * from the moment of its origin its continued existence was dependent on the will of Congress * * * *.

The congressional power is, of course, in no sense qualified by the fact that the Port Authority also acts under authorization from the States of New York and New Jersey. Union Bridge Co. v. United States, supra, 401; Philadelphia Co. v. Stimson,

supra, 635.

Respondents hardly will deny the scope of the control over the activities of the Port Authority which the Constitution commits to Congress, and which Congress expressly has reserved. Yet they place heavy reliance upon South Carolina Highway Department v. Barnwell Brothers, Inc., No. 161, this Term. There this Court sustained the power of the State to regulate the weight and size of the trucks which used its highways in interstate commerce. The Court recurred to the established principle that the State has authority over its own highways, even though the exercise of this power might burden or impede interstate commerce. But every paragraph of the opinion makes clear that this authority of the State is always subject to the powers of Congress.

In this case, we are in no sense denying the power of the states to carry on the activities now accomplished by the Port Authority. We readily agree that the Port Authority is performing services of great benefit both to the states and to the nation. We readily agree that its activities, in building bridges and in developing the port, are appropriate fields for state action and are sanctioned by long usage. Our point, and one which respondents hardly can dispute, is that this activity is one which at all times remains subject to the full power of Congress.

3. The Government does not argue that a tax upon the income paid by the Port Authority to its employees is, in any sense, an exercise of the power to regulate interstate commerce. It does contend that, since Congress has paramount and plenary authority over almost all of the activities of the Port Authority, the reason for the rule of tax immunity is absent.

We have shown that the basis for the rule of tax immunity is the implication derived from the nature of our Federal system, that the states and the national Government must be protected in their necessary independence each from the other. The decisions of this Court have, similarly, many times announced that tax immunity will not be extended beyond the limits set by the reason for the doctrine. (Supra, p. 55.)

The epochal dictum of Chief Justice Marshall, that the power to tax is the power to destroy (*Mc-Culloch* v. *Maryland*, 4 Wheat. 316, 427), was considered by him to be an inexorable constitutional principle because questions of degree were "so unfit

for the judicial department" (p. 430). This Court has long since recognized that neither the premise nor the conclusion of this bold syllogism is to be accepted literally.²⁹ But even if the great dictum be given its full force, it ascribes to Congress only that power which it already and indisputably has under the commerce clause.

Respondents ask for a purely mechanical application of the doctrine of tax immunity. They seek to have this Court sanction their exemption from taxation upon the highly conjectural ground that a non-discriminatory tax upon their compensation will "burden" the Port Authority such that the independence of the States of New York and New Jersey is threatened to the point that menaces our dual system of government. They must, at the same time, admit that all of the activities of the Port Authority are completely subject to the constitutional power of Congress to control, to supersede, or to forbid them. No decision in the entire field of tax immunity could be more anomalous than a decision that the United States, possessed of the sweeping powers over the activities of the Port Authority which is given by the commerce clause, is nonetheless incompetent to tax the com-

²⁹ See, in the body of constitutional doctrine relating to intergovernmental tax immunity, *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*, 258 U. S. 384; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523; *Willcuts* v. *Bunn*, 282 U. S. 216; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Helvering* v. *Mountain Producers Corp.*, No. 600, this Term.

pensation paid the Port Authority employees because of the fear that such a tax would invade the independence of the States of New York and New Jersey.

CONCLUSION

The activities of the Port of New York Authority are proprietary rather than governmental in nature. The Port Authority has existence only by virtue of a compact approved by Congress, and therefore can claim no independence of the United States. All of its activities are conducted in the field of interstate commerce, over which Congress has paramount power. In the light of these considerations, to hold respondents exempt from a nondiscriminatory income tax would extend the doctrine of intergovernmental tax immunity far beyond its reasons, and far beyond any limit sanctioned by the prior decisions of this Court. It is, therefore, respectfully submitted that the judgment of the court below should be reversed.

ROBERT H. JACKSON,
Solicitor General.

JAMES W. MORRIS,
Assistant Attorney General.
Golden W. Bell,
Assistant Solicitor General.
SEWELL KEY,
BERRYMAN GREEN,

Special Assistants to the Attorney General.

WARNER W. GARDNER,

Special Attorney.

MARCH 1938.

APPENDIX

Act of March 3, 1899 (Rivers and Harbors Act), c. 425, 30 Stat. 1121:

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War (U. S. C., Title 33, Sec. 401).

SEC. 18. That whenever the Secretary of War shall have good reason to believe that

any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall ·forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.

Act of March 23, 1906 (General Bridge Law of 1906), c. 1130, 34 Stat. 84:

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War

(U. S. C., Title 33, Sec. 491).

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad. street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair. without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. (U. S. C., Title 33, Sec. 492.)

Sec. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable oppor-

tunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates. of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (U. S. C., Title 33, Sec. 494.)

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built

in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. (U. S. C., Title 33, Sec. 498.)

Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174:

Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following, namely:

Whereas in the year 1834 the States of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two States in and about the waters between the two States, especially in and about the bay of New York

and the Hudson River; and

Whereas since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially

one center or district; and

Whereas it is confidently believed that a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York will result in great economies, benefiting the Nation as well as the States of New York

and New Jersey; and

Whereas the future development of such terminal, transportation, and other facilities of commerce will require the expenditure of large sums of money and the cordial cooperation of the States of New York and New Jersey in the encouragement of the investment of capital and in the formulation and execution of the necessary physical plans; and

Whereas such result can best be accomplished through the cooperation of the two States by and through a joint or common

agency: Now, therefore,

The said States of New Jersey and New York do supplement and amend the existing agreement of 1834 in the following

respects:

ARTICLE 1. They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the port of New York, holding in high trust for the benefit of the Nation the special blessings

and natural advantages thereof.

ART. 2. To that end the two States do agree that there shall be created and they do hereby create a district to be known as the "Port of New York District" (for brevity hereinafter referred to as "the district"), which shall embrace the territory bounded and described as follows:

The boundaries of said district may be changed from time to time by the action of the legislature of either State concurred in

by the legislature of the other.

ART. 3. There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "port authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other, or by Act or Acts of Congress, as hereinafter provided.

ART. 4. The port authority shall consist of six commissioners—three resident voters from the State of New York, two of whom shall be resident voters of the city of New York, and three resident voters from the State of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the State of New York and the New Jersey members by the State of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each State, respectively, except as herein provided.

Each commissioner may be removed or suspended from office as provided by the law of the State for which he shall be appointed.

ART. 5. The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

ART. 6. The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and

to make charges for the use thereof; and for any of such purposes to own, hold, lease, and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either State, or by any county, city, borough, village, township, or other municipality, shall be taken by the port authority, without the authority or consent of such State, county, city, borough, village, township, or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such State, county, city, borough, village, township, or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

The powers granted in this article shall not be exercised by the port authority until the legislatures of both States shall have approved of a comprehensive plan for the development of the port as hereinafter

provided.

ART. 7. The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both States, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either State except by and with the authority of the legislature thereof.

ART. 8. Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each State, respectively, shall apply to railroads and to any transportation, terminal, or other facility owned, operated, leased, or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation.

ART. 9. Nothing contained in this agreement shall impair the powers of any municipality to develop or improve port and ter-

minal facilities.

ART. 10. The legislatures of the two States, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the

development of the port of New York.

ART. 11. The port authority shall from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement.

ART. 12. The port authority may from time to time make recommendations to the legislatures of the two States or to the Congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

ART. 13. The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other Federal, municipal, State, or local authority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port.

ART. 14. The port authority shall elect from its number a chairman, vice chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their

qualifications and duties.

ART. 15. Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two States shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two States, but each State obligates itself hereunder only to the extent of \$100,000 in any one year.

ART. 16. Unless and until otherwise determined by the action of the legislatures of the two States, no action of the port author-

ity shall be binding unless taken at a meeting at which at least two members from each State are present and unless four votes are cast therefor, two from each State. Each State reserves the right hereafter to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

ART. 17. Unless and until otherwise determined by the action of the legislatures of the two States, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article 15, prior to the making of appropriations adequate to meet the same.

ART. 18. The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby.

ART. 19. The two States shall provide penalties for violations of any order, rule, or regulation of the port authority, and for the

manner of enforcing the same.

ART. 20. The territorial or boundary lines established by the agreement of 1834, or the jurisdiction of the two States established thereby, shall not be changed except as herein specifically modified.

ART. 21. Either State may, by its legislature, withdraw from this agreement in the event that a plan for the comprehensive development of the port shall not have been adopted by both States on or prior to July 1, 1923; and when such withdrawal shall have been communicated to the governor of the other State by the State so withdrawing, this agreement shall be thereby abrogated.

And

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the afore-

said acts: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: Provided, That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved, August 23, 1921.

Revenue Act of 1932, c. 209, 47 Stat. 169, 178:

SEC. 22. GROSS INCOME.

(a) General definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on

for gain or profit, or gains or profits and income derived from any source whatever.

Treasury Regulations 77:

ART. 51. What included in gross income.—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law.

ART. 643. (as amended by T. D. 4787, January 7, 1938, 1938 Int. Rev. Bul., No. 3, p. 6). Compensation of State officers and employees.—Compensation received for services rendered to a State is to be included in gross income unless the person receives such compensation from the State as an officer or employee thereof and such compensation is immune from taxation under the Constitution of the United States.

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FEB 18 1938

Supreme Court of the United States CROPLEY

No. 779

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

PHILIP L. GERHARDT.

Respondent.

No. 780

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

.

BILLINGS WILSON,

Respondent.

No. 781

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

JOHN J. MULCAHY,

Respondent.

MEMORANDUM IN OPPOSITION TO THE GRANT-ING OF WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

> JULIUS HENRY COHEN, Attorney for Respondents.

On the memorandum:

AUSTIN J. TOBIN, DANIEL B. GOLDBERG.

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Supreme Court of the United States

GUY T. HELVERING, Commissioner of Internal Revenue,

· Petitioner,

V.

No. 779

PHILIP L. GERHARDT,

Respondent.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner.

V.

No. 780

BILLINGS WILSON,

Respondent.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

V.

.

JOHN J. MULCAHY,

Respondent.

No. 781

MEMORANDUM IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

It is the position of the respondents that no sufficient reason appears in the petition filed herein by the Acting-Solicitor General for the exercise of the Court's discretion to review these cases.

The petition concedes (p. 29) that there is no conflict of decisions. On the contrary, on many occasions the Board of Tax Appeals, the Federal District Courts, and many Circuit Courts of Appeals have been unanimous in recognizing the immunity of state instrumentalities such as The Port of

New York Authority (hereinafter called the Port Authority) in the regulation and development of ports and harbors, and waterways and highways. The Board of Tax Appeals has so held in eight separate decisions, three of them involving the Port Authority itself. District Courts have decided in accord, and the Circuit Courts of Appeals for the First, Second and Ninth Circuits and the District of Columbia have so held. All of these cases have been accepted by the States as the law for purposes of financing port and harbor and bridge and tunnel improvements which today represent an investment of not less than a billion dollars—a quarter of a billion in the case of The Port of New York Authority herein.

It was upon the basis of two most recent decisions of this Court itself, clarifying the law upon the very questions here involved that the Circuit Court of Appeals below affirmed the decision of the Board of Pax Appeals, New York ex rel. Rogers v. Graves, 299 U. S. 401; Brush v. Commissioner, 300 U. S. 352. We submit that the latter two cases settled the law in this Court—that bridge and highway construction and operation by state governmental agencies is a governmental function immune from Federal taxation. Whatever necessity

¹ Moisseiff v. Commissioner, 21 B. T. A. 515; Carey v. Commissioner, 31 B. T. A. 839; Case v. Commissioner, 34 B. T. A. 1229 (the instant case below); Fitzgerald v. Commissioner, 29 B. T. A. 1113; Modjeski v. Commissioner, 28 B. T. A. 1051; Harlan v. Commissioner, 30 B. T. A. 804; Wait v. Commissioner, 35 B. T. A. 359; Platt v. Commissioner, 35 B. T. A. 472.

Boomer v. Glenn, Western District of Kentucky, Jan. 14, 1938, 1938 C. C. H. Fed. Tax Service ¶9049; United States v. King County, Washington, 281 Fed. 686.

³ Commissioner v. Ten Eyck, 76 F. (2d) 515, C. C. A. 2nd; Commissioner v. Harlan, 80 F. (2d) 660, C. C. A. 9th; Commissioner v. Gerhardt, 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); Halsey v. Helvering, 75 F. (2d) 234, U. S. Ct. App. D. C.; Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920, C. C. A. 1st.

existed prior to those decisions for the clarification of the question here involved, has now disappeared. Unless this Court can be induced to reverse all of these decisions and, in addition, disregard the guiding principles in this field of constitutional law recently restated in James v. Dravo Contracting Company, decided Dec. 6, 1937, there can be no purpose in granting the writs here prayed for. Certainly the petition offers not a single reason in support of its plea for a reversal of those cases, contenting itself with the statement (p. 29) that

"it seems plain that these decisions are not so evidently correct that the important questions of constitutional law presented in this petition can be taken to be settled." (Italics ours.)

But there is, in fact, much more than these cases which would have to be overruled. On May 20, 1929, the Commissioner of Internal Revenue ruled that the Alabama State Bridge Corporation was a "primary governmental instrumentality," and that its bonds were not subject to tax by the Federal government.¹

Again August 31, 1937, the Commissioner ruled, in a letter addressed to the Port Director of the Port of Corpus Christi, Nucces County Navigation District #1, that the district, created pursuant to Section 52, Art. 3, of the Constitution of Texas, as a navigation district, to improve rivers, bays, creeks and canals, and to construct and maintain canals and waterways, was "a corporate body of the State of Texas" and, as

This opinion of the Commissioner was in accordance with the decision of the Supreme Court of Alabama, Alabama State Bridge Corporation v. Smith, 217 Ala. 311, 116 So. 695, holding "it is intended to put into use and operation public funds and agencies of the state for the common benefit of the people of the state. It would construct bridges for the public use and, in the end, free to the public. It is an arm of the state, with none of the limitations, disabilities or responsibilities that affect private corporations as such."

such, a political subdivision of the State of Texas, and that bonds issued by it, and paid for entirely out of the net revenues of the district's public facilities and not out of taxes, were exempt from Federal income taxes. On January 12, 1936, the Commissioner advised the Thousand Island Bridge Authority that it too was a political subdivision of the State of New York, and that following the rule established in Weston v. Charleston, 2 Peters 449, and Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 583, the interest on its bonds was exempt from Federal income tax. On the same day, January 12, 1936, the California Toll Bridge Authority was so advised. On February 17, 1937, the Buffalo and Fort Erie Bridge Authority was so advised. On March 7, 1937, the Treasury Department reversed a prior adverse ruling and held the Marine Parkway Authority immune from taxation.1

The question of the immunity of the bonds of such agencies has been in this case from the beginning. The Commissioner of Internal Revenue *insisted* upon inserting into the Stipulation of Facts (R. 932):

"Respondent denies that the bonds of the Port Authority are exempted from federal taxation."

Yet, the State of New York holds \$17,444,000. of Port of New York Authority bonds. The Federal Public Works Administrator is now under contract to buy from the Port Authority \$29,100,000 of its 4% bonds to complete the second tube of the Lncoln Tunnel, if the Port Authority cannot raise

¹ In taking these positions, the Treasury Department was but following the highest courts sustaining the governmental nature of such instrumentalities of the various states of the Union. (See Robertson v. Zimmerman, 268 N. Y. 52; Gaynor v. Marohn, 268 N. Y. 417; Tranter v. Alleghany County Authority, 316 Pa. 65; In re California Toll Bridge Authority, 212 Cal. 298; California Toll Bridge Authority v. Kelly, 218 Cal. 7; Kelly v. Earle, 140 Pa. 141.)

the money by public sale of its bonds. Before assuming this obligation, the Public Works Administrator insisted upon being furnished with opinion of bond counsel of his own choosing to the effect that such bonds were "exempt under the Constitution of the United States as now in force" (R. 938, 939) and accepted that opinion for his action in purchasing Port Authority bonds. The Reconstruction Finance Corporation has bought and sold hundreds of millions of dollars of bonds of this character, it being the policy of that agency to encourage the creation of such self-liquidating enterprises so that the government might recover out of revenues collected from users of such facilities, the moneys advanced by the Federal government during the depression.

This Court is asked to reverse all the foregoing decisions, practices as well as the reliance thereon by investors in public securities, and to relegate all such agencies to the Siberia of "proprietary enterprises," leaving the states which created them to adjust as best they can the chaos such reversal would create in their fiscal policies. When the Commissioner seeks specifically to reverse the settled policy of regarding the construction of bridges, highways, and port improvements as governmental functions, such a revolution in legal and fiscal

¹ This appears to be a policy revived at the present time. The President has recently stated that he favors only self-liquidating public works. New York Times, Feb. 8, 1938, p. 1; id. Feb. 16, 1938, p. 8. Congress itself has recognized that such corporate municipal instrumentalities are members of the family of municipalities generally. The securities of agencies of just this type are expressly exempted from the provisions of the Securities Act (15 U. S. C. A., Sec. 77[c], par. 2), and of the Securities and Exchange Act (15 U. S. C. A., Sec. 78(c) [12]). The Public Works Administrator made the same determination under 40 U. S. C. A. Sec. 403(a) (2). On November 21, 1934 the Comptroller of the Currency ruled that national banks might purchase Port Authority securities under the statutory language "general obligations of any state or of any political subdivision thereof."

thinking should be supported by some cogent argument in a petition for a writ. None is given. The intimation that such a reversal will increase the revenues of Treasury will not stand analysis. Just the opposite is bound to ensue. A financial panic in government securities might very well occur.

We recognize, of course, that the Commissioner of Internal Revenue has the power to change his opinion. But those who are engaged in the realistic task of creating and supporting public enterprises, and the maintenance of public credit, know only too well what the presence or absence of tax immunity means. On this subject stability, not dubiety, is vital. If the investor is in doubt, he turns to other fields. Whatever may be said in criticism of stare decisis in other fields, that rule is the life of the law upon which fiscal policy must be based.

No amount of argument, oral or written, will, we believe, induce this court, in the light of the universal statement of the applicable principles contained in the whole line of authorities, and reiterated in the Rogers, Brush and Dravo cases, to make all the reversals necessary to acceptance of the Commissioner's present contention.

In the closing paragraph of the petition, the Commissioner refers to the large number of port, harbor and bridge organizations that are "affected by the questions presented in this case." They are not affected, unless the Commissioner can succeed in reversing the law on the subject. The controversy which has "plagued" (to use the Petitioner's language, Pet.

^{*}Compare statement of Under Secretary Magill to House Ways and Means Subcommittee (Treasury Department Release Jan. 15, 1938): "Business men daily make decisions in the light of existing tax laws, and hasty changes can produce unexpected results of much greater significance than the revenue directly involved."

p. 21) both the Federal tax officials, the Port Authority and similar agencies, is a "plague" only because the Commissioner refuses to follow the rulings, not only of himself and his predecessors, but also the Board of Tax Appeals, the high courts of the states, the Circuit Courts of Appeals, and this Court.

It is important that this "plague" should be ended. It was with this in view that the Circuit Court of Appeals expedited and dispatched these cases by deciding from the Bench, finding that what was being asked for was reversal of its prior ruling in the Ten Eyck case. Unless the Commissioner presents in his petition some reason for overruling all these authorities, the denial of the writ must follow. Yet all the Commissioner has to say concerning these decisions is that they "are not so evidently correct that the important questions of constitutional law presented in this petition can be taken to be settled." (Pet. p. 29.)

This Court will not grant a writ of certiorari to review the decision of the Circuit Court of Appeals upon any such inadequate statement as this. We believe that the mere reading of the opinions of the Circuit Courts of Appeals (cited supra, p. 2, ftnt. 3.) will enable this Court to dispose of the entire question on the application for a writ.

Wherefore, it is respectfully submitted, that the petition for writs of certiorari in these three cases should not be granted, but should be denied by the Court on the basis of the cited decisions of the Circuit Courts of Appeals, as well as this Court's own decisions in the Rogers and Brush cases, relied upon by the Circuit Court of Appeals in its rulings in these cases.

Statutes Involved..

For the convenience of the Court the Clerk has been furnished with additional bound copies of Stipulation Exhibit E (R., 851, 852) being the Sixth Edition with Supplement of the compiled statutes of The Port of New York Authority. This Exhibit contains the Port Compact of 1921 between the States of New York and New Jersey (pp. 9-28), the Comprehensive Plan of the two States for the development of the Port of New York, enacted as a part of the Compact (pp. 30 and 33), and other Port Authority legislation referred to in this memorandum.

Statement.

The statement of the facts presented in the petition does not fully present the facts with respect to the creation of the Port Authority, its functions, and the plan of port and highway development which it is carrying out. By omission, selection, and emphasis, the petition attempts to set up a Port Authority which does not exist.

For a correct statement of facts, therefore, we rely upon and respectfully refer the Court to the Stipulation of Facts (R., 826 to 1025), the Board's Findings of Fact (R., 132 to 215), and the brief summary that follows. No challenge of any kind was made to any of the Findings of Fact made by the Board of Tax Appeals. We treat these Findings as uncontested in this Court.

The Record clearly supports the conclusion of the Courts below that the Port Authority is a governmental agency of the States of New York and New Jersey, engaged in carrying out one of the sovereign and usual functions of government—the regulation and development of ports and harbors, their waterways, bridges, tunnels and highways.

The governmental problem faced by the States of New York and New Jersey in the development of the Port of New York is the direct result of the port's geography, of its tremendous concentration of population and commerce, and of its division into two states and over two hundred separate municipalities (Stip. of Facts, R., 833 and Ex. B, pp. 5, 6). These basic factors of geography, population, and political division are the factors that make the development of the port and harbor of New York a unique and extraordinary governmental problem (R., 832, 833; 140 to 144).

About one tenth of the entire population of the United States lives in the port district. Here lie the financial and industrial centers of the country. Here is the focal point of our national transportation system. More than half of our foreign commerce enters or clears within this district (Stip. Ex. B, pp. 1, 2).

Although its magnificent natural harbor and the resultant forces of world commerce give the port of New York its

An interesting commentary on the work of the Port Authority is found in "The Public Authority: Some Legal and Practical Aspects," by Peter R. Nehemkis, 47 Yale Law Journal, 14 at 30, 31, as follows:

[&]quot;The Port of New York Authority alone has succeeded in carrying out a scientifically determined program of regional planning. Under unified management and control the Port Authority has provided an economically adequate solution to the harbor, bridge, tunnel, railroad, and freight distribution problems of the New York metropolitan area. In the sphere of planning the Port Authority has served a two-fold purpose: it has provided a mechanism for consultation among various local governments for the development of integrated programs of related activities, and in the interstate sector of its operations it has projected blueprints for the development of broad-gauge harbor, port, communication and traffic facilities. In short, through a functional adaptation of the public corporation The Port of New York Authority is effectively bridging the hiatus which exists between economic and political spheres of government,"

position of leadership, New York nevertheless trailed behind the ports of the world in properly utilizing its natural advantages. The equipment and improvement of the port had grown from time to time out of the necessities of the moment. Prior to the cooperative action of the two states in 1916, there had been no cooperative regional planning. The port had failed to keep pace with competing ports (R., 141, 142; 833, 843, 844 and Stip. Ex. B, pp. 1-40).

The Port Compact of 1921 amended and supplemented the Treaty of 1834 between the two States (R., 138, 832). With the establishment of the packet lines and the development of the clipper ships in the early Nineteenth Century, world commerce had begun to converge upon New York. The Erie Canal had been finished in 1825. With its opening, settlers in the West began trading eastward through the Canal to the Hudson River and the Port of New York. New York Harbor Case, 47 I. C. C. 643, 656.

Construction of the Camden and Amboy Railroad, the first railroad to enter the port district, two years before the signing of the Treaty of 1834, foreshadowed the passing importance of the inland waterways to which New York had primarily owed its early development and growth. The great rivers which emptied into New York Harbor had been a most vital factor in the growth of the port, but after 1832 they became also one of the great natural barriers to American transportation—for the largest city in the world is separated from the mainland of the United States by the waters of the Hudson River and New York Harbor.

The Treaty of 1834 effectively settled the early quarrels of New York and New Jersey over the port area. It established the boundary line in the middle of the harbor and the Hudson River, giving New York jurisdiction over the waters

of the harbor and the river to the low water line on the Jersey shore. The paramount importance of the development of the Port of New York to the health, safety and general welfare of the people of the port district, have been stressed in almost every case involving the construction of the Compact of 1834.

The Compact of 1834 dealt only with boundaries and territorial jurisdiction. But the subsequent growth of American industry, the coming of the railroads and the automobile, the mounting volume of foreign commerce—requiring greater, more modern and efficient use of the port's waterfront—all brought new social problems and new economic conflicts calling for the exercise of sovereign powers.

A great era of railroad building brought the convergence of the rails of the nation upon its commercial capital, the Port of New York. It was physically impossible, however, for the rails to reach the City itself—they were blocked on the Jersey shore and with them was halted the supply of food, fuel, and other vital necessities of life in the metropolis.

While the river between New York and New Jersey and the waters of New York Bay are what Mr. Justice Holmes called "a treasure", they are also a handicap. During some winters, these waters are clogged with ice; food and coal cannot be lightered across. Fog, too, is a constant menace (R., 185, 1270-1278). This realistic situation brought drama-

Thus in Ferguson v. Ross, 126 N. Y. 459, 465, Judge Andrews wrete:

"The citizens of New York city may possibly have a greater stake in the matter than the citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It would impair its revenues, imperil its system of river, canal and railroad transportation, and it is not too much to say that every industrial interest, agricultural or mechanical, would feel its blighting influence."

tically to the front two movements, one the building of the first vehicular tunnel in this country and the second, the creation of the port authority by interstate compact.

The tunnel was a pioneer experiment because of the ventilation problem. Private enterprise could not have built such a tunnel. Only the two States by agreement between them could do the job. It cost \$50,000,000. New Jersey elected to meet her half of the contribution by state bond issue, and the bond issue was large enough to cover the Camden Bridge across the Delaware River. Both were treated as one great highway improvement. The bonds were to be repaid out of tolls collected from the users of both the tunnel and the bridge (R., 907, 908). New York State paid for its half of the cost of the Holland Tunnel by appropriations out of the Treasury (R., 908). Title to the tunnel is vested in the two States. Legislation directs how the revenues of the tunnel shall be applied (Ch. 421, Laws of N. Y. 1930; Ch. 247, Laws of N. J., 1930; R., 914, 915).

So much for the beginnings of vehicular crossings between the two States. The more general problem of freight handling had originally been met by ferrying across the waters of the lower Hudson. With the increasing population and commerce, it gradually became apparent that this was no adequate solution. It left to the mercy of the elements the health, safety, and even the lives of the population (R., 1113-1117). Congestion in the waters and in the streets about the railroad terminals became an ever increasing menace. Besides, the costliness of this method of harbor ferrying was reflected in mounting costs of living (R., 1195-1197, Stip. Ex. B, pp. 1, 2).

Up to 1917 the port's development had never been planned and it had failed to keep pace with the physical:

development of other ports (R., 141, 142, 833, 836, 837, 843, 844; Stip. Ex. B, pp. 1 to 40; New York Harbor Case, 47 I. C. C. 643).

Finally, in 1916, the problem became so acute that the people of both States demanded a solution. They saw that this density of population, the enormous concentration of commerce, and the resulting traffic congestion, necessitated the prompt creation of coordinated and efficient port and highway facilities. For seventy years now, freight had been shuttled uncertainly across the waters to and from the railheads on the Jersey shore. The most valuable of public waterfront properties had become cluttered with railroad pier stations to the exclusion and loss of steamship traffic, drastically in need of pier space. (New York Harbor Case, supra, at pp. 732, 733 and 739; Stip. Ex. B, pp. 278, 345, et seq.; R., 1113 to 1120). No adequate provision for the motorization of vehicular traffic had been made. This new and constantly growing traffic so congested the streets of the port district that many had become well nigh impassable (R., 1289 to 1305). Lack of vehicular bridges and tunnels, of coordinated freight handling facilities and terminals, of express highways, modern piers and markets—all resulted in confusion, delay and economic waste (R., 141, 142, 837; Stip. Ex. B, pp. 1-40).1

This grave and serious crisis was forcefully brought to public attention by the *New York Harbor Case*, 47 I. C. C. 643 (R., 834-836).

That case sought a revision of railroad freight rates in favor of New Jersey. It aroused great opposition in New

For judicial recognition of these facts, see, among other authorities, Commissioner v. Ten Eyck, 76 F. (2d) 515; Moisseiff v. Commissioner, 21 B. T. A. 515; Bush Terminal Co. v. The City of New York, 152 N. Y. Misc. 144, 148.

York (R., 836). The Interstate Commerce Commission saw clearly that the real problem was not so much one of freight rates, as one requiring complete reorganization and coordination of port facilities. The Commission's report was, in its very language, a sharp criticism of the bad arrangement of the port and it pressed upon the States the necessity for closer cooperation between them. (See particularly pp. 653, 732, 733 and 739 of that case.)

The creation of the New York, New Jersey Port and Harbor Development Commission in 1917 was the result of the vast public interest in the port problem aroused by the New York Harbor Case. The States appropriated \$450,000.00 for the work of this Commission, directed the Commissioners to make a comprehensive survey of port and harbor conditions, and to recommend proper and adequate remedies, together with constructive plans for the port's development (R., 139. 140, 837-839).

The ultimate conclusion of the Bi-State Commission was that, whatever physical plans might ultimately be worked out, the situation imperatively required the bringing together of the two States in a compact resolving conflicting interests, and setting up legal machinery through which their cooperation could be made continuous and effective. The public demand for the Compact, its support by the Governors, and its adoption by the Legislatures are adequately covered by the Board in its Findings of Fact and in the Stipulation (R... 133-147, 841-854).

The Compact itself is part of the Record (Stip. Ex. E, pp. 13-28). It provided for the adoption of a Comprehensive Plan for development of the Port District. The Port Au-

^{&#}x27;Chapter 426, Laws of New York, 1917, and Chapter 130, Laws of New Jersey, 1917.

thority formulated such a plat. It was adopted in 1922. The States declared it "binding upon both States with the same force and effect as if incorporated in this agreement" (Compact Article XI). It was sanctioned by Congress on July 1, 1922. Subsequent amendments added particular bridge and tunnel projects to this Comprehensive Plan (R., 870, 871, 881, 889, 916).

The Port Authority has now been carrying forward this program for seventeen years. During that time it has provided the States with bridges, tunnels and terminals. It has worked continuously on a program of port coordination, protection and development.

In 1923 the States directed the Port Authority to study the problem of interstate bridge and tunnel construction (R., 862). The increasing development of the motor vehicle had intensified the problem which the Port Authority was originally created to solve. By State direction since that time, the Port Authority has constructed, and is now operating the Goethals Bridge and the Outerbridge Crossing; the George Washington Bridge; the Bayonne Bridge, and the new Lincoln Tunnel.

The Holland Tunnel Commission was abolished and its operations and revenues were turned over to the Port Authority. The tunnel revenues were to be pledged, first to raise \$50,000,000. (which the Port Authority did raise and turned into the two States) to relieve the then pressing

¹ Public Resolution No. 66-67th Congress, H. J. Res. 337; Exhibit E, page 45. In this resolution Congress found that "* * * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."

² R. 148-153, 862-880.

^{*}R. 153-155, 881-890.

R. 156, 157, 889-896.

⁵ R. 163-168, 887-924.

burdens of taxation. They were, in addition, to be used to support other bridges and tunnels connecting the two States, to be built and operated by the Port Authority, as the agency and instrumentality of the two States. (Ch. 420, Laws of N. Y., 1930; Ch. 248, Laws of N. J., 1930; Ch. 421, Laws of N. Y., 1930; Ch. 247, Laws of N. J., 1930; Ch. 47, Laws of N. Y., 1931; Ch. 4, Laws of N. J., 1931.)

Reference to the Stipulation (Ex. K, R., 937) shows that the two States have always retained complete control of all Port Authority revenues. Chapter 48, Laws of New York, 1931 and Chapter 5, Laws of New Jersey, 1931, "regulating the use of revenues received by the Port of New York Authority," after directing that these revenues should be pooled for general port development purposes, specifically provided that surplus revenues shall be used subject to the direction of the two States (Ex. K, R., 937). Thus, the Port Authority holds the property of the two States under statutory trust, the revenues to be applied as jointly directed by the two States (R., 914, 915). Every dollar of revenue must be applied first to operating expenses and then to the liquidation of the debt incurred for the purpose of constructing these facilities, surpluses ultimately to go back to the two States, or otherwise disposed of, as directed by the two States. Even before this is done, the Port Authority is put under statutory obligation to pay back to the States cash advances of \$14,000,000. (R., 930).

The Port Authority's work in the study and development of the transportation, highway and terminal facilities, and of the port's freight handling methods, and the construction of Union Inland Terminal No. 1, have constituted a vital part of its program (R., 170-180, 944-954). It has effected substantial progress in connection with planning of railroad

belt lines, harbor congestion, freight delivery, pier development, harbor and channel surveys, coordination of railway marine activities, transportation of explosives in the harbor, free ports and tariff zones and pier storage (R., 183-187). It appears constantly before the Interstate Commerce Commission and the Shipping Board, the Federal Courts, and other regulatory and judicial bodies in defense of the interests of the port (R., 187, 986, 1347-1362).

Petitioner devotes much space to the rentable areas in the Port Authority's Inland Terminal No. 1, and the methods of leasing that area. Not a word is said about the purpose of the terminal and its place in the Comprehensive Plan. On this distorted presentation of facts the conclusion is reached (Pet., p. 22) that this Inland Terminal is "clearly proprietary in character."

The construction of inland terminals is a basic part of the Comprehensive Plan. Such terminals are the real key to the solution of the whole problem of freight distribution in the Port District. The Government disputes this. It attempts to create the impression that an inland terminal is nothing more than a commercial office building. Yet the Board below found as a fact (R., 170, 171):

"The Port Authority has extensively studied the port district's system of transportation, highway and terminal facilities and methods of handling freight used by the railways, ferry companies and other transportation agencies, and has sought methods of remedying street, highway, and waterfront congestion within the district. In its reports, which are made annually or more often,

¹ The binding effect of findings of fact made by the Board of Tax Appeals need not be restated. Helvering v. Rankin, 295 U. S. 123, 131; General Utilities and Operating Co. v. Helvering, 296 U. S. 200, 206. The Court's recent reminder is that the findings affirmed below "are unassailable if resting upon substantial support." Alabama Power Co. v. Ickes, decided Jan. 3, 1938.

it advised the governors and legislatures of both states that it was taking steps to remedy the congestion by an integrated and coordinated system of union inland freight terminals at various points in the port district, and it has been assisted in these projects by state appropriations and requisite legislation." (Italics added.)

The Board found that the terminal building "received the approval of the governors and legislatures" (R., 173).

The Board concludes that (R., 176):

"The union terminal has lightened traffic congestion and effected substantial savings to merchants in time and trucking costs, * * *."

The Government has attempted to picture the upper stories of the terminal simply as a rent producing activity (Pet., pp. 12 to 14, 22). Nothing could be further from the fact. To understand the method designed by the two States in providing Inland Terminal No. 1, and in financing it out of "tolls" or revenues derived from the utilization of surplus space in the upper stories of the Terminal itself, all that is required is understanding of the "authority financing plan."

In imposing upon the Port Authority the duty of effectuating the Comprehensive Plan, the States deliberately vested it "with all necessary and appropriate powers * * * to effectuate the same, except the power to levy taxes and assessments." (Comprehensive Plan, Sec. 8). The Port Authority was given power to issue bonds, but was obliged to plan public projects in such manner as would insure sufficient income to meet the expenses of operation and maintenance as well as interest and sinking fund requirements. Unless the Port Authority could demonstrate to purchasers of its bonds that a particular project was self-supporting, it would be unable to raise the moneys necessary to finance that pro-

ject, and without such financial assistance the Comprehensive Plan could never be effectuated (R., 180).

It was obvious at the very outset that a properly designed terminal would require an unusual amount of ground area so that the maximum number of trucks might be accommodated around the freight platforms. But real property in Manhattan Island is the most costly in the world, and the construction of a building covering a square block and yet only one or two stories in height is a financially impracticable project. No building of such limited height could produce sufficient revenue to support the capital expense of its site and of its construction (R., 1141-1143).

Thus, the only way in which the States could obtain the urgently needed inland terminals on the required self-liquidating basis was to adopt the normal economic method of using the surplus air-rights over the Terminal itself, for the production of incidental revenue. The Board clearly recognized this when it found (R., 180):

"Its construction and rental were deemed necessary to provide sufficient revenue to make the terminal facility economically practical, for the Port Authority received no subsidy for the terminal from the states, and had to raise its \$16,000,000 costs by bonds. To sell the bonds it was necessary to show sufficient prospective revenue from the project to make them attractive."

The Findings here establish the relationship of the Terminal Building as a part of an entire bi-state legislative plan of coordination. The Government, in its stress upon the husiness-like methods used by the Port Authority in its operations, seems to think that if it can convince this Court that the Port Authority operates efficiently, as would a business enterprise, then it cannot be considered governmental.

The character of the upper stories of Inland Terminal No. 1, as incidental to a governmental purpose is paralleled by the operations of the Panama Rail Road Company in New York, ex rel. Rogers v. Graves, supra. The Supreme Court concluded (p. 404):

"In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart but in their relation to the Panama Canal; and it is clear that the railroad and ships, after the completion of the Canal, continue to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the Canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the Canal as to confer upon the company a like immunity?" (Italics ours.)

In the Rogers case it appears from the record that the Panama Rail Road Company not only operates a railroad, steamship line and piers, but operates incidentally hotels, warehouses, docks, restaurants, dairy and food stores. According to the report of the Secretary of War, last year, the Panama Rail Road was able to make a net return of over \$1,519,629. after the payment of all operating expenses.

The Petitioner suggests that the Port Authority must be deemed to be proprietary because of its receipt of operating revenues (Pet., p. 23). Reference to the above case should dispose of this contention. Yet it is stipulated (R., 991) that all Port Authority projects are operated in the interests of the public and that "no profits inure to the benefit of private persons." It is also stipulated (R., 990) that there are no stock and no stockholders and that the Port

New York Times, January 9, 1938.

Authority is not owned or controlled by any private persons or corporations. It is therefore obvious that even if there were surpluses they would belong to the two States. The sums which the Government labels "surplus" are simply the net income over and above operating and interest charges. They are entirely consumed in amortizing the cost of these designedly self-liquidating public works. Any revenues over and above these amortization requirements must be held subject to disposal by the two States (Chap. 5, Laws of New Jersey, 1931; Chap. 48, Laws of New York, 1931; Stip. Ex. K).

Upon the facts found by the Board, and stipulated by the parties, there can be no escape from the conclusion reached by the Board below (R., 218):

"The Port Authority is organized for and operating in the traditionally sovereign function of protecting, improving, and developing the Port of New York; and all its activities are directed to and are incident to that end."

Reasons for Denying the Writs.

Though the Government admits that the precedents and authorities in these cases are unanimously in accord with the decisions of the Board and the Circuit Court of Appeals below, they, nevertheless, urge four questions (Pet., p. 21) which they would submit to this Court because the "decisions are not so evidently correct" that they "can be taken to be settled" (Pet., p. 29).

That no open or substantial question is presented in the Government's four Points should be clear from the following considerations:

1. THE ACTIVITIES OF THE PORT AUTHORITY ARE CLEARLY GOVERNMENTAL.

A constitutional issue cannot be more definitely settled than is the issue here, by the authorities relied on as conclusive in the opinion of the Court below. Brush v. Commissioner, 300 U. S. 352 and New York ex rel. Rogers v. Graves, 299 U. S. 401 are a complete affirmance of the principles upon which the Circuit Court decided these cases. In those two opinions, this Court considered and rejected every argument which the Government advances here in support of its contention that the activities of the two States, exercised through their agent the Port Authority, are proprietary.1 Not only did those opinions, together with James v. Dravo Contracting Company, decided Dec. 6, 1937 place a 1937 approval on Collector v. Day, 11 Wall. 113, but in the Rogers case the Court expressly joined canal, waterway, bridge, terminal and highway development as immune governmental functions. Moreover, that case firmly established the authority of government to select any instrumentality it chooses and pointed out that from the immunity of such instrumentality "it necessarily results that fixed salaries and ! compensation paid to officers and employees in their capacity as such, are likewise immune."2

This statement of the Court in so recent a case, is sufficient in itself to dispose of the question numbered "(4)" on page 22 of the Government's Petition, as to whether, "if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax."

¹ This case was commenced upon clear misconceptions of the effect of this Court's decision in *Helvering* v. *Powers*, 293 U. S. 214. The later decisions in *Brush* and *Rogers* should have dissipated these misconceptions. The Commissioner—in light of these later decisions, has abandoned many of the contentions of fact and law advanced in the lower Courts—but he seems unable to abandon the main quest.

The Brush case effectively disposed of the principal arguments which the Government seeks to reargue in the instant case. The decision went directly to one of the most important functions of the Port Authority when it stated:

"A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it * * *; but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

From the standpoint of precedent, there can be no escape from the determination of the Circuit Court, both in Commissioner v. Ten Eyck, 76 F. (2d) 515, and in the instant cases, of the governmental nature of port and harbor development by State agencies. The Court expressed this conclusion in the Ten Eyck case, in the following language (76 F. (2d) 515, 517, 519):

"Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people * * *.

"The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not withdrawing sources of revenue from the federal taxing power."

The authorities in support of the Circuit Court's conclusion in these cases are sufficiently stated in that opinion. See also *Mobile County* v. *Kimball*, 102 U. S. 691.

That the construction and operation of interstate bridges and tunnels is a governmental function, is likewise clear.

¹The superior status as governmental activities of port and harbor developments over even municipal water supply was suggested by the same Circuit Court in its decision in *Brush* v. *Commissioner*, 85 F. (2d) 32; 35.

Highways, bridges and tunnels have been a first concern of government. In addition to the Rogers and Brush cases cited above, see Butler v. Perry, 240 U. S. 328; Atkin v. Kansas, 191 U. S. 207; Escanaba Co. v. Chicago, 107 U. S. 678; United States v. King County, Washington, 281 Fed. 686; Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920; Halsey v. Helvering, 75 F. (2d) 234; Commissioner v. Harlan, 80 F. (2d) 660.

In addition to the foregoing arguments from precedent, the same conclusion may be reached by applying the pragmatic method of inquiry which this Court adopted in the Rogers and Brush decisions. As we read those two cases, the Court established three criteria from which it might conclude whether a given function was governmental or proprietary. These three lines of factual inquiry are:

- (a) What were the public necessities which required state or federal action?
- (b) Is the agency selected truly an instrument of government?
- (c) To what extent have governments exercised the function?

The answers for the Port Authority follow:

(a) The public necessity which required the creation of The Port of New York Authority was a necessity of joint state action in the development of the Port of New York. This necessity is a fact which must be deemed conclusive herein on the basis of the Board's Finding of Fact (R., 138):

"This Compact, which amended and supplemented a former one entered into between New York and New Jersey in 1834, was induced by the necessity, widely recognized, for joint state action in the development as a whole of the Port of New York, which lies partly within the jurisdiction of each state."

So, too, it is stipulated herein (R., 832, 833, 837, 839) that "* * it has been necessary that any action that has been taken by the two States for the development of the Port as a whole, be joint action by the two states."1 stipulated further that in 1916 the two states "found themselves faced with the problem of the Port's future develop ment" (R., 833). It is stipulated that the New York Harbor Case "aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desir ability of unifying the port's transportation system, and such efforts as might be desirable upon the part of both states to effectuate the reorganization" (R., 837). And it is stipulated that the Port and Harbor Development Commission "thoroughly carried out" its survey and recommended "an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two States * * *" (R., 839, 840).2

See, also, the observations of the Circuit Court of Appeals on the necessity for the creation of the Port Authority, expressed in Commissioner v. Ten Eyck, 76 F. (2d) 515, 518.

^{&#}x27;In its report, the New York State Joint Legislative Committee on State Fiscal Policies, submitted to the Legislature December 27, 1937, said:

[&]quot;The first important authority established in this country was The Port of New York Authority, which was created by joint action of the States of New York and New Jersey and was called into being because of the necessity of performing certain public functions within a single economic unit which unit, however, was hopelessly divided by political jurisdictions."

² Governor Lehman, in his Annual Message to the Legislature, on January 1, 1936, summed up the governmental necessity behind the creation of the Port Authority as follows:

[&]quot;In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the imperative demand for a continuing body with ample powers to meet the problems arising out of commerce and the operations of the two states lying within the Port District."

Obviously—following the reasoning of this Court in the Brush case—the Port Authority, too, was created to "protect the health, safety and lives of its inhabitants." The declaration of the two States is (Sec. 14, Chap. 4, Laws of New Jersey, 1931 and Sec. 14, Chap. 47, Laws of New York, 1931):

"The construction, maintenance and operation of vehicular bridges and tunnels within the said Port of New York District * * * are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto, and shall be required to pay no taxes or assessments upon any of the property acquired or used by it for such purposes."

This determination by the State Legislatures proceeded from a factual investigation by a joint State Legislative Commission (Stip. Ex. B, pp. 1, 7). The legislative judgment "is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility." This Court merely examines "the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." (Italics ours.) South Carolina State Highway Department vs. Barnwell Bros. Inc., October Term, 1937, #161, decided Feb. 14, 1938.

In the Rogers case the Court, after reviewing the necessity for the ownership of the Railroad Company by the Government in connection with the Canal, concludes that the public health, the making of sanitary rules and regulations, the national defense and the regulation of commerce, all required such governmental ownership. The Court specifically points out that through the Railroad Company the Government provides maritime facilities for the Canal Zone, and that the Government exercises its jurisdiction over "the ports at the ends thereof." The Court refers not only to the Canal itself, but to the governmental function of building and operating bridges and roads. Every single one of these factors is paralleled in the public necessity which led to the creation of the Port Authority (Stip. Ex. B, p. 35).

In the Rogers case this Court found that the public necessity for the construction of the Canal and the acquisition of the Panama Rail Road included the regulation of commerce. That purpose is also achieved by the Port Authority. This Court said (p. 406):

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation." (Italics ours.)

Such a purpose in the Port. Authority was announced by the States in the Port Compact (Stip. Ex. E, p. 13):

"It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the Port of New York, will result in great economies, benefiting the nation as well as the States of New York and New Jersey."

The coordination of conflicting port interests could not be accomplished save through the offices of a governmental agency (R., 1192-1194 and 1214-1216). It was this very inability of private enterprise, or even of the two States

separately, to achieve adequate development of the port, which led to the dangers pointed ont in the New York Harbor Case.

In the final analysis, the action of the States in creating the Port Authority was the result of the conviction of the Governors and Legislatures of the two States that the problem was so intimately bound up with the public welfare as to make unthinkable any solution by other than a direct instrumentality of the two States. This determination was clearly within the province of the two States. Brush v. Commissioner, 300 U. S. 352, 371.

We conclude, therefore, the answer to the inquiry made in this Point:—that the Port Authority fulfills the first of the tests proposed by the Courts, that with respect to the public and governmental necessity which forced its creation.

(b) The Port Authority is the governmental instrumentality of the States of New York and New Jersey. As this Court noted in its recent decision in James v. Dravo Contracting Co., decided December 6, 1937, the nature of governmental agencies and the mode of their constitution cannot be disregarded in passing on the question of tax exemption (p. 16 of the pamphlet print of the Dravo case). The Court pointed out that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the government "that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power." Your Honors said that "it was on that principle that 'any texation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled

by the other, exclusively to enable it to perform a governmental function,' was prohibited."

The status of the Port Authority as just such a governmental instrumentality becomes clear from consideration of its very nature and attributes and from the means employed by the States to effect its creation.

Inquiry into the governmental character of the Port Authority is answered by the declarations of the two Legislatures and of the Congress, that the Port Authority is "the joint or common agency" of the two States, "a body corporate and politic" and the "municipal corporate instrumentality" of the States (Stip. Ex. E, pp. 13, 43).

The state courts have repeatedly found that port districts, from their very nature and powers, are municipal corporations and governmental instrumentalities. Rosenkranz v. City of Evansville, 194 Ind. 499, 143 N. E. 593; State v. Port of Astoria, 79 Ore. 1, 154 Pac. 399; Stevenson v. Port of Portland, 82 Ore. 576, 162 Pac. 509. In the Ten Eyek case, the Court said of the action of the two States in creating the Port Authority:

"They joined in an agreement for the creation of a governmental agency * * *." (Italics ours.)

Again, the powers, privileges and immunities of the Port Authority are those of an instrumentality of government completely integrated into the governmental systems of the two States. It is unnecessary here to detail the attributes, powers and immunities of the Port Authority which establish its nature as an agency of government. They are all stipu-

These statements are entitled to the great weight and respect which the courts have always accorded legislative declarations. Block v. Hirsh, 256 U. S. 135; Levy Leasing Co. v. Siegul, 258 U. S. 242; Norman v. Baltimore & Ohio Railroad Co., 294 U. S. 240.

lated (R., 851, 853; 966-995) and are found as facts by the Board below (R., 199-207).

The States chose the Port Authority as the more efficient alternative to their own performance of their sovereign functions in the development of the Port. They were able thus to achieve the substitution of an economic for a political boundary line, to avoid the problem of dual sovereignty, the huge increase in the state debt, and to establish a permanent body not affected by political changes which so often obstruct long range planning.

Both State and Federal Courts have repeatedly found the Port Authority to be the agent of the States. To the utterances of the Court in the Ten Eyck case we add:—the Circuit Court for the Third Circuit in City of Newark v. Central R. R. Co. of N. J., 297 Fed. 77, similarly referred to the Port Authority as a governmental body. The Board of Tax Appeals so found not only in the instant cases, but also in Moisseiff v. Commissioner, 21 B. T. A. 515, and Carey v. Commissioner, 31 B. T. A. 839. The New Jersey Court of Chancery so held in New Jersey Interstate Bridge & Tunnel Commission v. Jersey City, 93 N. J. Eq. 550, and State Highway Commission v. Elizabeth, 102 N. J. Eq. 221. The New York Court of Appeals so referred to the Port Authority in Gaynor v. Marohn, 268 N. Y. 417; and the New York Supreme Court so held in The Port of New York Authority v. Lattin, N. Y. L. J., Dec. 3, 1930; Boyle Holding Corp. v. Medgreen, 154 N. Y. Misc. 189, and Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144. Most recently the Supreme Court of the State of New York held the Port Authority to be immune from suit on the ground that "it was created by treaty between the States of New York and New Jersey and is thus clothed with sovereign immunity." Pink

v. The Port of New York Authority, N. Y. L. J., Feb. 3, 1938, p. 567.

of this Court in the Rogers and Brush cases is: to what extent have governments exercised the function? We submit that governments have universally exercised the function of developing their ports, harbors, highways, bridges and tunnels. This conclusively appears from the historical and factual review made by the Circuit Court of Appeals in Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, 518 from which it concluded that ownership, control and operation of port facilities are essential and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States.

Similarly, and as we have already pointed out, on the basis of precedent, the construction and operation of interstate bridges and tunnels is clearly a governmental function.

Highways, bridges and tunnels have always been a first concern of government. As pointed out in Boomer v. Glenn, "The construction and maintenance of highways and bridges as a governmental function is one of the most ancient known to the law, having had its beginning prior to the civil or common law." The Court here points out the obligation of every parish, under the common law, to keep its roads and bridges in repair, and that no man, regardless of rank or dignity, was "exempt from work in the construction and repair of ways and bridges." Cooley's Blackstone, 4th Ed., Book I, 304. The embodying of this priciple of English Law in the statutory law of every one of the states is clearly traced.

Western District of Kentucky, January 14, 1938, C. C. H. Federal Tax Service, paragraph 9049.

Today, the combined expenditures on capital outlay and maintenance of highways is the largest item in state budgets.¹

2. THE PORT AUTHORITY IS THE AGENCY OF THE STATES ALONE.

The Board below completely disposed of the Government's argument that Congressional consent to an interstate compact destroys state immunity (R., 224). The Petitioner draws into this case the memorandum filed on behalf of the Attorney General in Hinderlider v. The La Plata River and Cherry Creek Ditch Company, #437, present Term, and refers to the argument therein that a compact has the status of an act of Congress (Pet., p. 25). We ask, in turn, that the memorandum filed in the same case by the States of Delaware, Maryland, New Jersey and New York, The Port of New York Authority and The Delaware River Joint Commission (in which memorandum the States of Virginia and Oregon also joined) be considered here as a complete refutation of the petitioner's contention that Congressional

Total Expenditures .

	Highways 752,171,713	
e	Education 559,737,280	
	Charities, Hospitals and Correction 260,634,569	
	General Government	
	1930	
e	Total Expenditures	
	Highways 886,514,579	
,	Education 598,058,080	
	Charities, Hospitals and Consction 276,896,277	
	General Government 124,866,796	

1929

These figures are found in the reports of the United States Department of Commerce, Bureau of the Census, entitled "Financial Statistics of the States" for the years 1929 and 1930.

^{&#}x27;Thus, in 1929 and 1930 (the last years for which complete figures are available) the combined expenditures of all states in capital outlay and maintenance were as follows:

consent to a compact renders the compact in effect an act of Congress and so deprives the states of their sovereignty. Upon the submission of the latter memorandum to this Court, the Attorney General retired from the broader position previously taken by him.¹

There is and can be no support for the petitioner's argument that Congressional consent given to states (as here). to act as sovereignties, to create and own property as sovereignties, to apportion revenues from joint properties as sovereignties, to use such revenues and properties for their joint advantage as sovereignties, produces as a matter of constitutional law the result that these very properties and revenues so created, so collected and so disposed of, shall be taken from the states by the Federal Government by taxation. If, as is urged here, the Port Authority is the creature of Congress, and, as was said below, "It exists subject to the caprice of the Federal Government," then indeed, as the Attorney General argued in his first memorandum in the Hinderlider case, the states are but. "Crown Colonies." Then indeed, that which they create by compact becomes subject to complete disposition by the Federal Government.2 However, the Brush, Rogers and Dravo -

¹ See Attorney General's memorandum in that case dated February, 1938.

[&]quot;"An over-centralized government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centered in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have states we should speedily have to create them." (Italics ours.) Address of Hon. Charles E. Hughes, New York State Bar Association, Jan. 1916.

opinions teach us that this Court will not change the form of this Government and make of the states such satrapies of the Federal Government.

3. Federal Regulation of Interstate Commerce Does Not Impair the Immunity of State Instrumentalities.

This argument was raised and disposed of in Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, 518 and Commissioner v. Harlan, 80 F. (2d) 660, 662 by the Circuit Courts, and by this Court in United States v. California, 297 U. S. 175, 184.

The Petitioner's contention is based on the theory that the regulation of interstate commerce and the control of navigable waters are matters exclusively within the sphere of Federal sovereignty. That is not the law. The courts have repeatedly held that the states have exclusive power and jurisdiction over navigable waters and interstate commerce within their territorial limits, where the Federal Government has not preempted the field. "This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority." Escanaba Co. v. Chicago, 107 U. S. 678.

Even as this memorandum is written, the entire point of the Government's argument in this field is demolished by

Gibbons v. Ogden, 9 Wheat. 1; South Carolina v. Georgia, 93 U. S. 4; United States v. Bellingham Bay Boom Co., 176 U. S. 211; Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245; Rundle v. Delaware & Raritan Canal Co., 14 How. 80; Gilman v. Philadelphia, 3 Wall. 713; Lake Shore M. S. R. Co. v. Ohio, 165 U. S. 365; Pound v. Turck, 95 U. S. 459; Covington Bridge Co. v. Kentucky, 154 U. S. 204; Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421; Sage v. The Mayor, 154 N. Y. 61; Ferguson v. Ross, 126 N. Y. 459.

the Court's decision in South Carolina State Highway Department et al. v. Barnwell Bros., Inc., et al., October Term, 1937, #161, decided February 14, 1938. We quote especially the following:

"Few subjects of State regulation are so peculiarly of local concern as is the use of State highways. From the beginning it has been recognized that a State can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competency even though interstate commerce is materially affected." (Italics ours.)

Furthermore the Petitioner is clearly on unstable ground also when he urges that the Federal Government's power to regulate navigation and interstate commerce includes the power to tax for revenue. That conclusion rests upon complete confusion between the Federal power to regulate and tax as an incident to regulation, and the Federal power to tax for revenue. The income tax is exclusively a tax for revenue purposes, and cannot be upheld under the Federal regulatory powers, even though it affects a facility which might be subject to some degree of Federal regulatory power. When the taxing power is exercised to regulate an object properly within the Federal regulatory power such taxation will be upheld. Board of Trustees v. United States, 289 U. S. 48; National Bank of Little Rock v. United States, 101 U. S. 1; Veazie Bank v. Fenno, 8 Wall. 533. However, when the purpose of the tax is procurement of revenues, the tax on a state instrumentality will not be upheld. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 586. This vital distinction was recently emphasized by this Court in United States v. California, 297 U. S. 175, 184. In that case the

State of California was attempting to avoid Federal regulatory power over a state belt line railroad. It urged that since it was immune from Federal taxation, it must also be held immune from regulation. The Court flatly rejected the analogy between the two Federal powers, in the following language:

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction of taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf v. Mitchell, 269 U. S. 514, 522-524, 70 L. Ed. 384, 391, 392, 46 S. Ct. 172, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * But there is no such limitation upon the plenary power to regulate commerce." (Italics ours.)

The result of Petitioner's contention is clear. The States would thereby be compelled to refrain from doing this necessary work and the Federal Government would have to undertake it at a cost greatly in excess of the imaginary tax loss, which Petitioner attempts to suggest.

The Government's whole line of argument upon this point ignores the dominant characteristic of American government, the very characteristic which gave rise to the immunity rule—the dual and *limited* sovereignty of *both* state and federal governments.

Clear thinking recognizes that these very *limitations* upon the sovereignty of our state and national governments gave rise to the doctrines established in *McCulloch* v. *Mary*-

land and Collector v. Day. The rule came into being for the very reason that the whole matter involves timited sovereignties—yet, the Petitioner argues that those very limitations negative the rule!

4. THE FUNCTIONS OF THE PORT AUTHORITY DO NOT CONSTI-TUTE A WITHDRAWAL OF ANY NORMAL SOURCES OF FEDERAL REVENUE.

Although the Government has now dropped the contention advanced below that a tax upon the Port Authority would not burden the two States, it still advances the argument that the Port Authority has lost its immunity because it comes into competition with some private corporations, such as ferry companies.

Thus, much is made of the fact that the Port Authority's bridges and tunnels compete with private ferries, and that they have decreased the revenues of such ferries (Pet., pp. 9, 10, 11, 12, 14, 23). But competition in itself does not alter the character of an otherwise governmental activity and the Rogers and Brush cases in this Court point this out so specifically that it is unnecessary to argue it in this Court. It should be noted, however, (R., 1198-1200, 1282, 1287), that the entire purpose of the two States in developing the Port is to increase and facilitate its commerce, and to make those contributions necessary to the health and welfare of its people. This necessarily forwards the general prosperity—and so directly increases Federal tax returns.

The argument of the Government in these cases gives no consideration whatsoever to the millions of dollars saved to New York shippers and the consuming public through the

work of the Port Authority. This public work by the States directly increases the sources, quantity and stability of Federal revenues. In short, the petitioner's argument that the decrease of ferry revenues results in a decrease of Federal taxes, is like an effort to prove that a business is losing money by showing its expense items—completely ignoring its returns.

The Government advances as a reason for granting the Writs that (Pet., p. 21):

"A decision by this Court is necessary finally to put at rest a controversy which has plagued both the Federal Taxing Authorities and the Port Authority, and an answer to it is necessary to point the way to a disposition of the tax questions which are accumulating about the growing use by States of Commissions and Authorities, often interstate in nature, to perform functions analogous to those of the Port Authority."

No valid distinction can be made between direct State action and the action of States exercised through authorities or other municipal instrumentalities. This entire authority plan was one devised to secure the construction of public works by self-liquidating state or federal agencies to avoid tremendous tax burdens. The Port Authority led the way in this field. In the brief submitted to the Circuit Court of Appeals by the States of New York and New Jersey as amici curiae, they set forth the very real burdens that would be imposed upon their Treasuries if State authorities and commissions such as the Port Authority could be taxed by the Federal Government. The two States pointed out in that

^{&#}x27;For the information of the Court we have included in the appendix of this memorandum the summary of argument contained in this brief of the States of New York and New Jersey below.

brief that the Port Authority was created to carry on the States' projects upon an assumption of tax immunity as the instrumentality of the States. It was shown that the States had obligated themselves (Compact of 1921, Art. XV) to contribute \$100,000 annually until such time as the Port Authority should become self-sustaining. Although such immediate objective has been reached, the imposition of a Federal tax upon the Port Authority, its income, bonds and the salaries of its employees, could easily impose upon the States the duty of resuming these annual payments. In addition, the States have advanced \$18,500,000. in aid of the port programs, to be repaid by the Port Authority. To quote from the States' brief submitted to the Circuit Court:

"A tax burden which increases operating expenses would either indefinitely postpone, or else-forever prevent, the fulfilment by the Port Authority of this contingent obligation. Furthermore, since the two States may direct the expenditure of any excess Port Authority revenues a Federal tax would reduce a potential source of state income. Finally the States hold in their Treasuries \$17,444,000. of Port Authority bonds."

Actual fee title to the Holland Tunnel as we have pointed out, is held directly by the States of New York and New Jersey. The vital importance of this fact is that without the revenues from the Holland Tunnel, all of the other Port Authority projects would not even be self-sustaining (R. 167). Were it not for the plan of unified operation in Port development the surplus revenues from the Holland Tunnel could be deposited directly in the Treasuries of the two States.

Let there be no mistake here as to the real object of the Government in seeking these Writs. It is the definite purpose of the Government to challenge the immunity of the

bonds and revenues of the Port Authority, if they are successful (R. 932). Indeed, in their Petition here they make their purpose plain when they say (Pet. p. 23) "Certainly, the Port Authority * * * should not be granted a complete tax immunity". And again, they refer on page 24 of their Petition to a tax not only on the employees but upon the Port Authority itself. The fact is, that it has been admitted by the Under-Secretary of the Treasury that the taxation of salaries is a "game hardly worth the candle."

The real purpose is to open up a wide source of new revenue to the Federal Government—regardless of its effect on the States and regardless of its ultimate effect on the Federal Government itself. In attempting to do so by the Writ sought here the Government mistakes its forum. As admitted by the Under-Secretary of the Treasury, the immunity of State bonds from Federal taxation can be removed only by resort to constitutional amendment. Upon that same occasion, the Under-Secretary was quick to point out that such a constitutional amendment should be

^{&#}x27;Tax Magazine, December, 1937, page 700. At page 703 of the same article the Under-Secretary said: "Nevertheless, the Treasury in recent years has advocated the constitutional amendment rather than the statutory method of change, primarily to remove any doubt of the validity of the proposed tax, when imposed, with the possible unsettlement of the bond market while the test cases were proceeding through the courts." (Italics ours.)

Address to the Bar Association of the City of New York, February 8, 1938. Previously the Under Secretary advised the House Ways and Means Subcommittee, "Indeed in view of the importance of the various taxes in our national economy it is well that changes should not be made precipitately." Treasury Dept. Release, Jan. 15, 1938.

operative only in futuro, a result which cannot be achieved by the action of this Court.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

JULIUS HENRY COHEN,
Attorney for Respondents and
General Counsel for The Port of
New York Authority.

On the memorandum':

AUSTIN J. TOBIN, DANIEL B. GOLDBERG.

February 18, 1938.

APPENDIX.

(For the information of the Court we append the "Summary of Argument" from the brief submitted in the Circuit Court below, as *amici curiae*, by the States of New York and New Jersey.)

Summary of Argument.

I. The States of New York and New Jersey are here in fulfillment of the pledge of their Compact of 1921 to carry on "faithful cooperation in the future planning and development of the port of New York." The relations of the two States were not always characterized by such cooperation. Prior to the Compact of 1921 the history of the two States records a succession of conflicts arising out of the existence of the boundary line separating them politically, but which in actual effect divided a district historically, commercially and economically one. These conflicts were partially resolved by the Treaty of 1834 but ultimately were settled by the amendment to that treaty creating The Port of New York Authority and known as the "Compact of 1921." The creation of the Port Authority by this compact went straight to the heart of these interstate differences—to the avoidance, by planned effort, of conflict in a great economically unified harbor area, divided by a political boundary line. It was an outstanding achievement in sovereign cooperation, covering that very type of governmental dispute over boundaries, trade preferences and trade routes which for want of cooperation today in the larger theatre of international affairs, endangers the peace of the whole world.

II. A tax upon the Port Authority would impose a direct monetary burden upon the States themselves. Your amici

created and financed the Port Authority to carry on state projects upon the natural assumption of tax immunity. The Port Authority is the direct agent and trustee of the two states in the development of the port. The two States by joint action can at any time dissolve the Port Authority and take over its properties directly. Indeed, the fee title to the Holland Tunnel still remains today in the two States. The States obligated themselves, furthermore (Compact of 1921, Article XV), to contribute \$100,000 annually until such time as the Port Authority should become self-sustaining. Although such immediate objective has been reached, the imposition of the Federal tax burden could easily impose upon the States the duty of resuming these annual payments. Moreover the States have actually advanced \$18,-500,000 in aid of the Port Authority's construction program, to be repaid by the Port Authority. A tax burden which increases operating expenses would either indefinitely postpone, or else forever prevent, the fulfilment by the Port Authority of this contingent obligation. Furthermore, since the two States may direct the expenditure of any excess Port Authority revenues a Federal tax would reduce a potential source of state income. Finally, the States hold in their Treasuries \$17,444,000 of Port Authority bonds.

A holding in favor of the Government here would tend to destroy the usefulness for all of the states of the Authority method of achieving results and would adversely affect the political subdivisions and municipal corporations of the states in the performance of what have heretofore been regarded as normal and vital governmental functions.

The welfare and prosperity of the people of the two States are entirely dependent upon the business of the Port of New York. In turn, that business is dependent upon the joint

planning, protection and sound development of the port's facilities. If that planning, protection and development jointly by the two States is to be hampered, then the Federal government, in the loss of tax revenues, will be among the first to feel its adverse effects.

III. Since the purpose and functions of the Port Authority establish its immunity, the salaries of its officers and employees must likewise be held to be immune. The States cannot be hampered or interfered with by the federal government in the choice of human instrumentalities. An officer or employee of government is a part of the government itself, has a continuity in and of government, and represents and stands in the place of government. Any attempt by another sovereign to tax that employee is a direct interference with his government's operations.

IV. As an instrument of the two States the Port Authority is closely integrated into our governmental machinery. It was created by treaty and clothed with the attributes of sovereignty.

V. The governmental character of the functions exercised by the Port Authority is established both from the purposes of its creation and the governmental character of its functions. In its fulfillment of these two tests, it meets in all respects the considerations found by this Court in Commissioner v. Ten Eyck, 76 F. (2d) 515, and by the Supreme Court of the United States in New York, ex rel. Rogers v. Graves, 299 U. S. 401 and Brush v. Commissioner, 300 U. S. 352.

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Supreme Court of the United

October Term, 1937.

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No. 779

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner.

PHILIP L. GERHARDT,

Respondent.

No. 780

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner.

BILLINGS WILSON,

Respondent.

No. 781

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

JOHN J. MULCAHY,

Respondent.

BRIEF FOR RESPONDENTS.

JULIUS HENRY COHEN. Attorney for Respondents.

AUSTIN J. TOBIN, DANIEL B. GOLDBERG. On the Brief.

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Supreme Court of the United States

October Term, 1937.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

PHILIP L. GERHARDT,
Respondent.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

V.

BILLINGS WILSON,

Respondent.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

٧.

JOHN J. MULCAHY,

Respondent.

No. 779

No. 780

No. 781

BRIEF FOR RESPONDENTS.

The Issues.

The Port of New York Authority is the municipal corporate instrumentality of the States of New York and New Jersey, created by Compact of April 30, 1921, for their joint development of the highways, bridges, tunnels and waterways of an interstate port district. The immediate issue here

is whether or not the Federal government may tax the employees of a state agency engaged in such activities. However the Commissioner makes it clear that his objective is to tax the revenues of the Port Authority itself (Petitioner's Brief, pp. 45, 47, 56), and the interest on its bonds (Stipulation, Record, folio 311).

The Petition for Certiorari conceded that there is no conflict of decisions (p. 29). On the contrary, and on many occasions, the Courts have been unanimous in upholding the immunity of the Port Authority and similar state instrumentalities engaged in the regulation and development of ports, harbors, waterways and highways. The Board of Tax Appeals has so held in eight separate decisions, three of them involving the Port Authority itself. The Circuit Courts of Appeals for the First, Second and Ninth Circuits and the District of Columbia have so held. Within the past few weeks a District Court has written an opinion in accord. All of these cases have been accepted by the States as the law for the purposes of financing port, bridge and highway

¹ For the convenience of the Court, our references to the Transcript of Record are keyed into the original page numbers, which appear in the margin of the Transcript here. Hereafter the abbreviation "R. f." will be used for "Record folio."

² Moisseiff v. Commissioner, 21 B. T. A. 515; Carey v. Commissioner, 31 B. T. A. 839; Case v. Commissioner, 34 B. T. A. 1229; Fitzgerald v. Commissioner, 29 B. T. A. 1113; Modjeski v. Commissioner, 28 B. T. A. 1051; Harlan v. Commissioner, 30 B. T. A. 804; Wait v. Commissioner, 35 B. T. A. 359; Platt v. Commissioner, 35 B. T. A. 472.

³ Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920, C. C. A. 1st; Commissioner v. Ten Eyck, 76 F. (2d) 515, C. C. A. 2nd; Commissioner v. Gerhardt, 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); United States v. King County, Wash., 281 Fed. 686, C. C. A. 9th; Commissioner v. Harlan, 80 F. (2d) 660, C. C. A. 9th; Halsey v. Helvering, 75 F. (2d) 234, U. S. Ct. App., D. C.

⁴ Boomer v. Glenn, Western District of Kentucky, 21 F. Supp. 766.

improvements which today represent a state investment of billions—a quarter of a billion in the case of The Port of New York Authority alone.

It was upon the authority of two recent decisions of this Court itself that the Circuit Court of Appeals upheld the 'immunity of the Respondents—New York ex rel. Rogers v. Graves, 299 U. S. 401 and Brush v. Commissioner, 300 U. S. 352. The Respondents submit that these two recent decisions of this Court are determinative of the present case. In the Rogers case the Court expressly joined canal, water way, bridge and highway development as immune governmental functions. The Brush case went directly to one of the most important functions of the Port Authority when the Court said (pp. 372, 373):

"A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it; * * * but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

These two decisions confirmed the conclusion reached by respected authority when the Port Authority was first created. Before any of its securities were offered for public sale, it secured the opinion of the Honorable Charles Evans Hughes, after his retirement as Associate Justice and prior to his appointment as Chief Justice. He said (November 10, 1925):

"The Bonds issued by the port authority for the construction of the two bridges and the income therefrom will be exempt from both Federal and State taxation."

"The immunity of the bonds from Federal taxation follows from the fact that, as already stated, the port authority is a public agency, a governmental instrumentality of the two States. It is explicitly declared to be such in the Act of each State providing for the

financing to build the two bridges * * *, and this declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established."

The Commissioner cites not a single case in any Court which in any way conflicts with this reasoning. His brief is simply a plea for a reversal of all prior decisions in the field of constitutional immunity. Such a plea is obviously fraught with danger, not alone to the stability of the Port Authority, but also to all state agencies performing similar functions. It is a plea which undermines that certainty which is the essence of a government of laws.

We submit that the Brush and Rogers decisions completely encompass the state functions here at issue and are conclusive as to the governmental character of the functions exercised by the States of New York and New Jersey through the Port Authority. There is, therefore, no question here of "extending the constitutional exemption." (See Helvering v. Mountain Producers Corporation, No. 600, Present Term, decided March 7, 1938.) Port and highway developments have always and universally been accepted as essentially governmental. Such activities are clearly inside the orbit of this Court's decisions in the field of reciprocal governmental immunities. To tax them in the case of the Port Authority would impose a direct burden upon a governmental instrumentality of two States and would directly tax their revenues and properties.

Statutes.

For the convenience of the Court, the Clerk has been furnished with additional bound copies of Stipulation Exhibit E (R. f. 284), being the Sixth Edition with Supple-

ment of the compiled statutes of The Port of New York Authority. This Exhibit contains the Port Compact of 1921 between the States of New York and New Jersey (pp. 9-28), the Comprehensive Plan of the two States for the Development of the Port of New York, enacted as a part of the Compact (pp. 30 and 33), and other Port Authority legislation referred to in this brief. The Clerk has also been furnished with additional copies of Stipulation Exhibit B (R. f. 282), the "Joint Report with Comprehensive Plan and Recommendations of the New York, New Jersey Port and Harbor Development Commission."

Statement of Facts.

Proper application of the law can be made in this case only through a complete presentation of the facts. The history of the governmental problems faced by the States in the development of the Port of New York, and the story of their efforts to solve those problems make up the sum and substance of these cases. The nature of the Port Authority's functions is to be found in the reasons for its creation. That history and those reasons receive but cursory attention in the Commissioner's brief, which, therefore, does not accurately reflect the true picture of the Port Authority and its work. We present the real picture as compactly as possible in the following statement, relying upon the Stipulation of Facts (R. f. 276 to 340) and the Board's Findings of

Three independent judicial tribunals have recently discussed the creation and the nature of the Port Authority. Their findings and conclusions are so different from those offered here in the statement of the Commissioner that we refer to them for comparison: Bush Terminal Co. v. The City of New York, 152 N. Y. Misc. 144, 147 to 152 (1934); Commissioner v. Ten Eyek, 76 F. (2d) 515, 518 (1935); Findings of Fact below, R. f. 44 to 72 (1936).

Fact below (R. f. 44 to 72). This record completely supports the conclusion of the Courts below that the Port Authority is a governmental agency engaged in carrying out sovereign and necessary functions of government.

The governmental problem faced by the States of New York and New Jersey in the development of the Port of New York is the direct result of the port's geography, of its tremendous concentration of population and commerce, and of its division into two states and over two hundred separate municipalities (Stip. of Facts, R. f. 277 and Stip. Ex. B, pp. 5, 6). These basic factors of geography, population, and political division are the factors which make the development of the port and harbor of New York a unique and extraordinary governmental problem (Stip. of Facts, R. f. 2774) Findings of Fact, R. f. 47, 48).

About one tenth of the entire population of the United States lives in the port district. It includes the financial and industrial center of the country. It is the focal point of our national transportation system. More than half of the Nation's foreign commerce enters or clears through the Port of New York (Stip. Ex. B, pp. 1, 2).

Although its magnificent natural harbor and the resultant forces of world commerce brought about this development of the Port, its haphazard growth and the lack of proper

¹ No challenge of any kind is addressed to the Findings of Fact. Their binding effect need not be restated. Helvering v. Rankin, 295 U. S. 123, 131; General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 206. The Court's most recent statement is that findings affirmed below are unassailable if resting upon substantial support. Alabama Power Co. v. Ickes, 82 Law. Ed. Adv. Ops. 263, 266.

² A map of the Port of New York area, indicating particularly the boundaries of the Port District as established by the Compact of 1921 and the principal political subdivisions of the area, is appended to this Brief.

planning gave rise to intolerable conditions of waste and congestion. These conditions endangered health, welfare and economic security of the people of the two States (Findings, R. f. 47, 48; Stip. Ex. B, pp. 1-40). The story of the Port Authority is a chronicle of the States' efforts to correct these conditions.

THE TREATY OF 1834.

The background of the port problem is found in the history of the Port of New York. The early colonization as a Dutch trading post, the development of the port under British rule, its rise to world prominence during the Napoleonic wars, the development of steam navigation and the opening of the Erie Canal are all factors in the complete port picture. However, within the limitations of this brief, we must turn to the factors which brought about the Treaties of 1834 and 1921 between the States of New York and New Jersey.

With the establishment of the packet lines and the development of the clipper ships in the early Ninteenth Century, world commerce began to converge upon New York. The Eric Canal was finished in 1825. With its opening, settlers in the West began trading eastward through the Canal

¹ In the report of the Board of Engineers of the War Department, on the Port of New York published by the Government Printing Office in 1926, and approved by the Chief of Engineers, United States Army, it is said (Part I, p. 384):

[&]quot;New York will always be a great world port. With proper future planning, coordination, and management it will retain much business it may otherwise lose. Its task is to improve and coordinate its immense facilities; to conceive of itself always as not only a center of population and industry but as a national gateway, with responsibility to the Nation to make itself a port having the most reasonable charges, the quickest dispatch, and the most efficient service."

to the Hudson River and the Port of New York. New York Harbor Case, 47 I. C. C. 643, 656.

With the growing economic importance of the harbor waters, New York and New Jersey found themselves in a conflict of interests. The Port District, though commercially and economically a geographical unit, was cut in two by a political boundary line. Though the interests of the people in the two States were ultimately dependent upon the unified development of the port, their provincialism frequently led to short-sighted competition. Controversies arose over harbor franchises, ferry rights, jurisdiction over the harbor islands and boundaries. Acts of reprisal were passed and at one time the two States were "almost on the eve of war." See the argument of counsel, Gibbons v. Ogden, 9 Wheat. 1, 184.

The Treaty of 1834 effectively settled the early quarrels of New York and New Jersey over the port area. It established the boundary line in the middle of the harbor and the Hudson River, giving New York jurisdiction over the waters of the harbor and the river to the low water line on the Jersey shore (Stip. Ex. B, p. 42). The paramount importance of the development of the Port of New York to welfare of the people of the port district has been stressed in almost every case involving the construction of the Compact of 1834. Thus in Ferguson v. Ross, 126 N. Y. 459, 465, Judge Andrews wrote:

"The citizens of New York City may possibly have a greater stake in the matter than the citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It would impair its revenues, imperil its system of river, canal and railroad transportation, and it is not too much to say that every industrial

interest, agricultural or mechanical, would feel its blighting influence."

However, the construction of the Camden and Amboy Railroad, the first railroad to enter the port district, two years before the signing of the Treaty of 1834, foreshadowed the passing importance of the inland waterways to which New York had primarily owed its early development and growth. The great rivers which emptied into New York Harbor had been a vital factor in the growth of the port, but after 1832 they became also one of the great natural barriers to American transportation—for the largest city in the world is separated from the mainland of the United States by the waters of the Hudson River and New York Harbor.

THE GROWTH OF THE PORT.

The Compact of 1834 dealt only with boundaries and territorial jurisdiction. But the subsequent growth of American industry, the coming of the railroads and the automobile, the mounting volume of foreign commerce—requiring greater, more modern and efficient use of the port's waterways and highways—all brought about new port problems and economic conflicts of tremendous scope, calling for the joint exercise of the sovereign powers of both States. Accordingly, it is stipulated here (Stip. R. f. 278):

"That prior to and in the year 1916 the States * * * found themselves faced with the problem of the port's future development.

"That by reason of the fact that * * * the bay and harbor of New York, constituted and formed the political boundary of two States * * * it has been necessary that any action that has been taken by the two states

for the development of the port as a whole, be joint action by the two states."1

The great era of railroad building brought the convergence of the rails of the nation upon the Port of New York. However, it was physically impossible for the rails to reach the City itself. They were blocked on the Jersey shore—and with them was halted the supply of food, fuel, and other vital necessities of life in the metropolis, save for uncertain and wasteful lighterage across the harbor (R. f. 371, 372, 426; New York Harbor Case, 47 I. C. C. 643, 649, 651, 670). While the port district owes its development primarily to its harbor waters and its rivers, they are not an unmixed blessing. In hard winters, these waters are clogged with ice, and the supply of necessities is interrupted. Fog, too, is a constant menace (Findings R. f. 61; R. f. 424-426).

With the increase in population and commerce, it became apparent that the lighterage and ferriage of freight—indeed, the entire terminal system of the port area—were wholly inadequate. This system—or, as it was found, lack of system—left to the mercy of the elements the health, welfare, and even the lives of ten million people (See R. f. 47, 371, 372, 426). Congestion in the harbor waters and in the streets about the railroad terminals became an ever increasing menace (R. f. 430-437), Furthermore, the costliness of this antiquated system was reflected in mounting costs of living (R. f. 399, 400, Stip. Ex. B,-pp. 1, 2). The unified development of the Port had never been properly planned; it had failed to

¹ See also the recitals of the Compact of 1921, Stip. Ex. E, pp. 13, 14; Findings of Fact, R. f. 44, 46; Commissioner's Brief, p. 3.

² The importance of tunnels and bridges to transport supplies for the port district's ten million people, when ice, fog and other marine disturbances interfere with water transportation, was pointed out also in the *Hell Gate Bridge Case*, 144 I. C. C. 514, 525.

keep pace with the physical development of other ports (Findings R. f. 47, 48, Stip. R. f. 278; Stip. Ex. B, pp. 1 to 40; New York Harbor Case, 47 I. C. C. 643, 653-656).

Finally, in 1916, the States of New York and New Jersey found themselves faced with the cumulative problem of the port's future development (Stip. R. f. 278). They saw that this density of population, the enormous concentration of commerce, and the resulting traffic congestion, necessitated the prompt creation of coordinated and efficient port and highway facilities. For seventy years, the two States had countenanced the slow and uncertain shuttling of freight by ferry across the harbor waters to and from the railheads on the Jersey shore. They had permitted their most valuable waterfront properties to become cluttered with railroad pier stations, to the exclusion and loss of steamship traffic drastically in need of pier space (New York Harbor Case, 47 I. C. C. 643, 732, 733, 739; Stip. Ex. B, pp. 278, 345, et seq.; R. f. 371 to 374). No adequate provision for the motorization of vehicular traffic had been made. This new and constantly growing traffic so congested the streets of the port district that many had become well nigh impassable (R., f. 430 to 435). Lack of vehicular bridges and tunnels, of coordinated freight handling facilities and terminals, of express highways and modern piers—all resulted in confusion, delay and economic waste (Findings R. f. 47, 48; Stip. R. f. 279; Stip. Ex. B, pp. 1-40).2

¹ Since that time the traffic problem has become more intensified. "A Survey of Traffic Flow on the Principal Highways of New York," Information Bulletin No. 41, The Regional Plan Association, New York City.

² For judicial recognition of these facts, in addition to the New York Harbor Case, 47 I. C. C. 643, see Commissioner v. Ten Eyck, 76 F. (2d) 515; Bush Terminal Co. v. The City of New York, 152 N. Y. Misc. 144, 148.

These conditions ultimately gave rise to two movements: the building of interstate vehicular crossings, and the creation of a port authority by interstate compact.

The first of these crossings was the Holland Tunnel. It was a pioneer experiment in interstate highway construction, particularly because of the ventilation problem. It cost fifty million dollars. After referendum New Jersey elected to meet her half of the contribution by state bond issue (Chap. 262, Laws of New Jersey, 1924). The bonds were to be repaid out of tolls collected from the users of the tunnel. New York paid for its half of the cost by appropriations out of its treasury (Stip. R. f. 303). Title to the tunnel is vested in the two States. Legislation directs how the revenues of the tunnel shall be applied (Chap. 421, Laws of New York, 1930; Chap. 247, Laws of New Jersey, 1930; R. f. 305).

THE NEW YORK—NEW JERSEY PORT AND HARBOR DEVELOPMENT COMMISSION.

The Holland Tunnel, of course, was but a beginning. The more general problem of port coordination had been forcefully brought to public attention in 1915 when, after study by several legislative commissions (Stip. R. f. 278-279), the Governor of New Jersey appointed a committee to institute a proceeding before the Interstate Commerce Commission, known as the New York Harbor Case, 47 I. C. C. 643 (Findings R. f. 47). That case sought a revision of railroad freight rates in favor of New Jersey. It aroused great opposition in New York (Stip. R. f. 279; Findings R. f. 47). The Interstate Commerce Commission was quick to see that the real problem was not so much one of freight rates as one requiring complete reorganization and coordination of

Port facilities. What the Port faced was, in effect, a war of conflicting interests between two sovereignties which could be settled amicably only by interstate cooperation and compact (Cf. Stip. R. f. 278). The Interstate Commerce Commission's Report was primarily an exposition of the inadequacy of the port's facilities and the imperative demand for joint state action in the solution of a problem which had an important bearing, not only upon their own, but also upon the commerce of the whole nation (47 I. C. C. 643, 653, 732, 733, 759). The Commission said:

"The complainants' contention that the methods of handling both domestic and export traffic at the port of New York must be thoroughly revised if the maximum of efficiency is to be attained is abundantly established by the evidence of record. * * * A large part of the valuable waterfront on the New Jersey shore, now used almost wholly for the transfer of freight between the rails and the floating equipment, could be released for other and more suitable purposes; the congestion on the west side of Manhattan Island caused by the assembling of countless vehicles at the crowded piers to receive and discharge freight would be considerably relieved; and the pier stations on the Manhattan shore, now taxed to capacity, could be devoted in part to other uses.

" * * It is necessary that the great terminals at the port of New York be made practically one, and that the separate interests of the individual carriers, so long an insuperable obstacle to any constructive plan of terminal development, be subordinated to the public interest. * * *"

(pp. 732, 733.)

"The difficulty of attaining a physical coordination of facilities at the port, and administering them as an organic whole, is attributable in part to the nature of the harbor and to the fact that the opposite sides of the port lie in different states. * * * That part of the port lying west of the Hudson River is in the state of New Jersey, and the fact that the port is thus divided into

two parts by a state line cannot be overlooked by those who would understand its history and the problem confronting those who are interested in its development." (p. 653).

As a direct result of the great public interest in the port problem aroused by the New York Harbor Case and as the result of the admonitions of the Interstate Commerce Commission, the two States created the New York, New Jersey Port and Harbor Development Commission. They appropriated \$450,000 for its work, and directed it to make a comprehensive survey of port and harbor conditions and to recommend proper and adequate remedies, together with constructive plans for the port's development (Findings R. f. 47; Stip. R. f. 279-280).

Indeed, the Interstate Commerce Commission in the New York Harbor Case, took official cognizance of the fact that New York and New Jersey had already begun to cooperate in this manner, saying (47 I. C. C. 643, 738, 739):

"* * in considering the situation here presented, the Commission cannot with propriety overlook the fact that bills have been introduced in the legislatures of the states of New York and New Jersey providing for the appointment by the governors of those commonwealths of state commissioners to study jointly the situation at the port and make appropriate recommendations, 'to the end that the said port shall be efficiently and constructively organized and furnished with modern * * * piers, rail and water and freight facilities, and adequately protected in the event of war'."

No adequate picture of the problem which the States faced, nor of the solution they devised, can be placed before this

¹ Chapter 426, Laws of New York, 1917 and Chapter 130, Laws of New Jersey, 1917.

Court without quotations from the Joint Report of the New York, New Jersey Port and Harbor Development Commission, (Stip. Ex. B, pp. 1-7, 26, 27, 31 and 35). After pointing out the serious port situation and the tremendous movements of commerce "required to carry on the business of the port and to sustain the life and health of its inhabitants," together with the modern facilities that were urgently required, the Commission said:

"The Port has indeed gone to unmatched lengths in providing many of these facilities. But it has not kept pace with the demands and there has never been any general comprehensive plan for terminal developments of the Port considered as a whole to which all parties interested have subscribed or toward the realization of which all, municipal and private, have cooperated. In consequence the flow of goods has become more and more irregular, terminal costs have mounted and the burden of congestion and expense presents a situation needing immediate correction.

"This is not merely a problem for the concern of public officials, directors of railroads, steamship companies and other terminal enterprises. It is a great sociological problem of chief concern to the public at large. A heavy burden is thrown upon the commerce of the Port and adds to the cost of living. The public feels the oppressiveness of this burden but is unable to analyze its causes, which, however, can and should be removed. (Joint Report, p. 1.)

"The first necessity of the Port District is its daily food supply. Following this closely in importance is the supply of manufactured necessities, such as clothing and furniture, and of raw materials from which it can produce these and other necessities and luxuries, both to supply its own population and to keep goods moving in the channels of trade. In short, the ability of New York to function as a great port depends first of all on its ability to feed and clothe its own population and to provide its merchants and manufacturers with the trans-

portation they require to do business successfully. Until it serves itself it can not adequately serve others." (Joint Report, p. 7.)

The Report finally recommended an interstate compact resolving the conflicting interests of the two States, and setting up legal machinery through which their cooperation could be made effective and continuous. It pointed out the necessity for creating an agency which should have a new borrowing capacity to meet the enormous demands of port reorganization, since the cities and States were already so overburdened with public debt that they could not undertake the improvements themselves. (Stip. Ex. B, pp. 36-38.) It was recognized, therefore, that in addition to the usual powers of government commissioners the members of the proposed port body would require a municipal corporate form. The proposal for self-liquidating projects, with its necessary segregation of revenues for repayment, demanded the efficiency and insulation afforded by the corporate form.

The report of the New York, New Jersey Port and Harbor Development Commission contains a detailed account of the steps taken by the two States in arriving at the final form of the Compact (Stip. Ex. B, pp. 436, 437). Legislative Commissions from each State were appointed, and they made careful study of the work done by the Port and Harbor Development Commission itself. Public hearings were held, the various municipalities were heard, and revisions of the draft of Compact were made (Stip. Ex. B, pp. 436, 437). The public demand for the Compact, its support by the Governors and their messages to the Legislatures, and the final

¹ This method has become well recognized in governmental fiscal policies. See Nehemkis and Williams, Municipal Improvements As Affected By Constitutional Debt Limitations, 37 Columbia Law Review, 178, 201.

adoption by both States, are adequately covered by the Findings of Fact and the Stipulation in these cases. (Findings, R. f. 44-49; Stip. R. f. 281-285.)

In his annual message to the Legislature on January 1, 1936, Governor Lehman of New York said:

"The Port of New York Authority was established in 1921. And it is important to recall the unique situation that gave birth to it. In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the imperative demand for a continuing body with ample powers to meet the problems arising out of the commerce and the operations of the two States lying within the Port District."

THE PORT OF NEW YORK AUTHORITY.

The Compact itself is part of the Record (Stip. Ex. E, pp. 13-28). After recitals of the sovereign purpose of the action and of the necessity for the cooperation of the two States through a joint agency, the States supplemented and amended the Treaty of 1834 with the following pledge:

"ARTICLE I.

"They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof." (Stip. Ex. E, p. 14.)

Everything the Port Authority has done is in fulfillment of this pledge.

After creating the Port Authority as a body corporate and politic and their common agency, with general powers of port development, the Compact directed it to prepare a plan for the comprehensive development of the Port of New York

(Stip. Ex. E, p. 21). In 1922 such a plan was submitted by the Port Authority and adopted by the two States (Stip. Ex. E, pp. 30-33). The States declared it "binding upon both States with the same force and effect as if incorporated" in the Compact (Stip. Ex. E, p. 21). It was sanctioned by Congress on July 1, 1922, with the finding that (Public Resolution No. 66—67th Congress, H. J. Res. 337; Stip. Ex. E, p. 45):

"* * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."

The statutory Comprehensive Plan sets forth the principles to govern the development of the Port. The governmental purpose behind those principles is clear—the development of interstate port, harbor, bridge, highway and waterway facilities, the elimination of highway and traffic congestion, and the promotion of the health and welfare of the people of the Port District. The Plan provided for the unification of terminal operations in the port area (Stip. Ex. E, pp. 34-35). It directed that:

"highways for motor truck traffic should be laid out so as to permit the most efficient inter-relation between terminals, piers and industrial establishments not equipped with railroad sidings and for the distribution of building materials and many other commodities which must be handled by trucks; these highways to connect with existing or projected bridges, tunnels and ferries." (Stip. Ex. E, p. 35).

Provision is made for the construction of tunnels and bridges, "the location of all such tunnels or bridges to be

at the shortest, most accessible and most economical points practicable, * * * providing for and taking account of all reasonably forseeable future growth in all parts of the district." (Stip. Ex. E, p. 37).

Section 8 of the Comprehensive Plan authorizes and directs the Port Authority "to proceed with the development of the port of New York in accordance with the said comprehensive plan as rapidly as may be economically practicable" and vests the Port Authority

"with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State, to effectuate the same, except the power to levy taxes or assessments." (Stip. Ex. E, p. 43).

This grant of plenary powers is instinct with a recognition of the governmental character of the functions of the Port Authority. It clothes the Port Authority with every power that could be delegated by the two States, with the sole exception of the power to levy taxes and assessments. This single reservation was, in effect, a direction that the Port Authority's work should be self-liquidating, placing the cost and burden of public improvements upon the shoulders of those who use the facility rather than upon the shoulders of all taxpayers. This is the "Authority Plan."

Section 8 of the Comprehensive Plan further authorizes all municipalities within the District to cooperate in the effectuation of the Plan and vests them with such powers as may be appropriate or necessary so to cooperate. It specifically provides that:

"The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *" (Stip. Ex. E, p. 44).

Following the provisions of Article XI of the Compact (Stip. Ex. E, p. 21), the Comprehensive Plan has been supplemented, from time to time, by additional plans for the development of the Port District.

THE WORK OF THE PORT AUTHORITY 1921-1938.

General Port Development.

The Port Authority has now been carrying forward the States' program for seventeen years. During that time, it has provided the Port with bridges, tunnels and terminals. 'It has worked continuously on a program of port coordination, promotion and development. The attempt to segregate certain of the Port Authority activities as "the inconsiderable portion * * * which deal with the development of the Port" (Commissioner's Brief, p. 38) indicates a misunderstanding of the entire program of Port development. We have shown that all the powers of the Port Authority emanate from the "planning and development of the port of New York" (Compact, Art. I). The Port Authority's bridges, terminals, highways and tunnels are all integral parts of a single Comprehensive Plan of port development-and the Commissioner has stipulated here that each one of those projects was undertaken "in partial effectuation of the Comprehensive Plan for the development of the Port of New York" (Stip. R. f. 290, 291, 294, 297, 303, 307, 316).1

¹ However, there seems to be some confusion as to the Commissioner's position on this point. In the reference noted above he takes the position that (a) port development is an inconsiderable portion of the Port Authority's work. He has stipulated, (b) that all the Port Authority's projects are "in partial effectuation of a Comprehensive Plan for the development of the Port of New York." On page 18 position (c) is taken, that the Port Authority "has not undertaken any projects to develop the harbor of New York in any way!" (Italics ours.)

The Board found that (R. f. 73):

"The Port Authority is organized for and operating in the traditionally sovereign function of protecting, improving and developing the Port of New York; and all its activities are directed to and are incident to that end." (Italics ours.)

The Port Authority's bridges and tunnels, particularly the George Washington Bridge, the Holland Tunnel and the new Lincoln Tunnel are nationally known. But equally important are the following activities in studying, regulating and coordinating the facilities of the Port and protecting its economic interests:

(a) The Port Authority is constantly engaged in studies of necessary channel improvements, the establishment of anchorage areas, of pier and bulkhead lines, and in the determination of clearances for overhead bridges, or subaqueous tunnels and pipe lines, in order to accommodate and plan

¹ A disinterested commentary on the work of the Port Authority is found in "The Public Authority: Some Legal and Practical Aspects", by Peter R. Nehemkis, 47 Yale Law Journal 14, at 30, 31, as follows:

^{... •} The Port of New York Authority alone has succeeded in carrying out a scientifically determined program of regional planning. Under unified management and control the Port Authority has provided an economically adequate solution to the harbor, bridge, tunnel, railroad, and freight distribution problems of the New York metropolitan area. In the sphere of planning the Port Authority has served a two-fold purpose: it has provided a mechanism for consultation among various local governments for the development of integrated programs of related activities, and in the interstate sector of its operations it has projected blueprints for the development of broad-guage harbor, port, communication and traffic facilities. In short, through a functional adaptation of the public corporation The Port of New York Authority is effectively bridging the hiatus which exists between economic and political spheres of government."

for the normal development of world shipping at the Port (Findings R. f. 62; see also Stip. R. f. 325; R. f. 395).

- (b) Pursuant to the powers vested in the Port Authority to make suitable rules and regulations for the improvement and conduct of navigation and commerce (Stip. R. f. 325), the Port Authority has forwarded such studies and recommendations. As an instance, it has held public hearings on the subject of free storage time allowed to freight on steamship piers (Findings R. f. 62; R. f. 446-448). Following these hearings, legislation was introduced in both States providing for the regulation of such practice by the Port Authority. This legislation has already been passed in New York (Chapter 711, Laws of New York, 1935) and is pending in New Jersey.
 - (c) At the request of municipalities, the Port Authority has investigated and reported on such matters of regional concern as the establishment and location of foreign trade zones. The Port Authority's facilities are at the disposal of municipalities in the port area for such assistance, and are given gratuitously as one of the general duties of port development (Findings R. f. 62; R. f. 440-443).
 - (d) The Comprehensive Plan directs the Port Authority to "cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said Comprehensive Plan" (Stip. Ex. E, p. 43). Numerous studies have been made, and assistance given to the highway departments of the states, in accordance with this direction. Elaborate studies have been made of the origin, destination and volume of traffic using

interstate highways. In the engineering and financial aspects of linking up the interstate bridge and tunnel plazas with the connecting highways of each state, the Port Authority dovetails its plans with those of the state highway officials (R. f. 404, 406-410). As we shall show (infra, p. 34), in addition to the construction of its interstate bridges and tunnels and their immediate approaches, the Port Authority has spent approximately \$36,000,000 in the construction of free public highways connecting up the main traffic arteries of the two state highway systems.

- (e) The food supply and terminal markets of the Port District have received extensive consideration. Assistance was rendered to the City of New York in its plans for relief of terminal market congestion of perishable foods. The Port Authority presses the solution that shipments of these commodities from all railroads be consolidated at a limited group of three or four market piers, constituting in effect a union produce terminal (R. f. 393, 394).
- (f) The Port Authority takes a leading part in defending the Port against discriminatory freight rates, and eliminating other barriers to the free flow of commerce (Findings, R. f. 62, 63). The Port Authority's trained staff of experts is engaged in the protection of the Port against diversion of traffic due to inequitable freight rates, pursuant to the direction of Article XIII of the Compact (Stip. Ex. E, p. 22). In conferences with the Railroad Traffic Associations and the United States Maritime Commission, and in formal litigation before the Interstate Commerce Commission and the United States Shipping Board, the legal and technical staff of the Port Authority are constantly engaged in presenting

and defending the States' interests in the development of the Port (Findings R. f. 63; Stip. R. f. 329; R. f. 450 to 454).

- (g) The Port Authority has forwarded a progressive unification of existing railroad facilities in the interest of lower costs of living and doing business, and of lower freight handling costs through the port district. (Findings R. f. 57, 60, 62; R. f. 399, 400.) In one instance, a thirteen mile stretch of tracks along the New Jersey waterfront between Bayonne and Edgewater (designated in the Comprehensive Plan as Belt Line No. 13) was unified after detailed studies by the Port Authority, extensive negotiations with the carriers, and hearings before the Interstate Commerce Commission. Track hauls of 13 miles replaced circuitous hauls of over 100 miles; rates were simplified with great savings to the shippers of the Port District (R. f. 335-338).
- (h) As a result of exhaustive studies of marine operations of the rai roads in New York Harbor, the Port Authority effected the pooling of tugs and other marine equipment. Accordingly, a unified Railroad Marine Service was established for the harbor in 1933 (Findings R. f. 62; R. f. 396-398).
- (i) One of the principal causes of port waste and inefficiency is the rivalry between railroads to secure strategically favorable competitive positions. The Interstate Commerce Commission called attention to the necessity of consolidating shipments and unifying terminal facilities at the Port of New York (New York Harbor Case, 47 I. C. C. 643, 732, 733). The efforts of the Port Authority to eliminate the

duplication of facilities brought about by these rivalries have already proved effective, even though gradual in achievement. The inland terminal system (infra, p. 26) is an outstanding instance. In 1935 the Port Authority cooperated extensively with the Federal Coordinator of Transportation. At his request studies, reports and recommendations were prepared and submitted to him.

The foregoing represent but a few typical port functions which are continuously administered in the general furtherance of the Comprehensive Plan.² The Commissioner's attempt to belittle these activities by asserting that they require but a small part of the Port Authority's revenues proposes an unsound test for measuring the relative importance of the various phases of the Port Authority's work in port development. The testimony of Respondent Billings Wilson, (R. f. 367-470) Assistant General Manager of the Port Authority in Charge of Operations, reveals that about two-thirds of his time and effort is spent on the type of activities above discussed. It is the work of the operating executives which truly characterizes the work of the Port Authority. The bridge and tunnel portion of the port development program requires large operating and maintenance expenses,

¹ The obstacles which have delayed the coordination of these facilities are evidenced by the President's recent appointment of a Special Committee (New York Times, March 18, 1938, page 1) consisting of the Chairman of the Interstate Commerce Commission and Commissioners Eastman and Mahaffie to consider inter alia, the "establishment of a Federal Authority to compel railroad managements to coordinate or consolidate terminal and other facilities to eliminate wasteful competition and expenditure • • • "

² For a more complete list see Petitioner's Brief, page 39, footnotes 14 and 15.

but those expenses represent only a departmental phase of the port program. Naturally, less money is spent on the work of planning port facilities than in actual construction and operation to effectuate those plans.

The port functions summarized in this section return no monetary revenues, though their return to the general welfare of the people of the port district is substantial. Their purpose, as found by the Board below, (Findings R. f. 62) is:

"* * * to improve transportation conditions, reduce living costs and enable the Port of New York to meet the competition of other ports, * * * ."

Inland Terminals.

The Commissioner attempts to portray a port authority, two of whose main functions are the operation of a "commercial" building and an "interstate bus line." This is a distortion of the facts. In the Commissioner's presentation, nothing is said about the purpose of the inland terminal system and its place in the Comprehensive Plan, save that it is "a part of the Port Authority's plan to coordinate transportation facilities and to reduce congestion." Throughout his description of Inland Terminal No. 1 (Brief, pp. 13-15), there is not a word about the problem of freight distribution in the Port District, not a word explaining street, highway and waterfront congestion, not a word about the years of earnest effort devoted to the solution of this ever-increasing problem, not a word explaining the plan of action which the States finally adopted, not a word about the method by which the States financed the Terminal, and not a word about the results the States are achieving through the Inland Terminal plan. No—these facts of record are omitted. The only "description" of the Terminal is a detailed discussion (Brief, p. 14) of the incidental use of the space over the Terminal. And on the basis of that "statement," the conclusion is suggested that Inland Terminal No. 1 is merely a commercial office building, and "clearly * * * of a proprietary character" (Brief, p. 34).

The construction of inland terminals is a fundamental part of the entire Comprehensive Plan (See Stip. Ex. E, p. 42). Such terminals are the real key to the solution of the whole problem of freight distribution in the Port District. The Commissioner, however, chooses to discuss neither the problem nor the solution.

Yet, it is stipulated, and the Courts below found as facts (Findings R. f. 57) that:

"The Port Authority has excensively studied the port district's system of transportation, highway and terminal facilities and methods of handling freight used by the railways, ferry companies and other transportation agencies, and has sought methods of remedying street, highway, and waterfront congestion within the district. In its reports, which are made annually or more often, it advised the governors and legislatures of both states that it was taking steps to remedy the congestion by an integrated and coordinated system of union inland freight terminals at various points in the port district, and it has been assisted in these projects by state appropriations and requisite legislation." (Italics ours.) (See also Stip. R. f. 315.)

It is stipulated, and the Courts below found as a fact that "The project received the approval of the Governors and Legislatures" of both States (Findings R. f. 58; Stip. R. f. 316, 317). After reviewing the purposes of the Terminal and

the method of its operation (Findings R. f. 58, 59), the Board below concluded that:

"The union terminal has lightened traffic congestion and effected substantial savings to merchants in time and trucking costs, * * *."

. The need for the Inland Terminal system and its beneficial results appear in the record (Stip. R. f. 315-316; R. f. 371-394; 436-438). Each of the competing trunk-line railroads having its terminus on the New Jersey shore, transported its freight over the river by lighters and carfloats to and from its own individual pier stations on the Manhattan waterfront (R. f. 372). "Shippers were obliged to deliver packages for different railroads to their separate pier stations and likewise to collect in-bound freight from these widely separated points" (R. f. 386-387; Findings R. f. 59). This necessitated long hauls, duplication of trucking and excess handling (R. f. 436-437). It caused tremendous congestion on the City's streets, increased the accident toll, and added to the cost of all freight clearing through the Port of New York (Stip. R. f. 315-316; R. f. 430-431, 436; R. f. 386, 438).

"The necessity of using car floats and lighters between the New Jersey terminals and the stations and piers on the New York side was the cause of very serious congestion of vehicles in the streets leading to the stations and piers where incoming freight was unloaded and outgoing freight assembled. The consequent cost of picking up and delivering freight assumed such proportions that it was found that the cost of handling freight through New York terminals was equivalent to the line-haul cost from New York to Buffalo. Constant complaints and agitation against the high cost of handling freight at New York resulted and it became a matter of imperative economic necessity to take drastic measures for the purpose of remedying the intolerable

situation which existed." Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144, 148.

It was to meet these conditions that the Inland Terminal system was adopted by the two States. That system utilizes the Port Authority's interstate vehicular crossings and its union inland freight station. By the use of these tunnels the tremendous expense of actually bringing the rails under the river to Manhattan has been avoided. The system's operation is described in the record (R. f. 373, 379-380). railroads transport all less-than-carload freight by motor truck to a single union inland terminal, either directly from the New Jersey railheads through vehicular tunnels, or from the New York pier stations. At the terminal it is sorted out upon one immense platform and each consignee in the Port District may by a single trucking operation pick up all the freight consigned to him on that day. Unlike the old pier station system he need no longer call at many congested waterfront piers. Similarly, a New York shipper may transport all his freight, even though it is to be shipped by different railroads, to the single union inland terminal station. It is there sorted out and delivered through vehicular tunnels, by fully loaded trucks, along with the freight of other shippers, to the New Jersey yards of each of the trunkline railroads (Findings R. f. 59; R. f. 379-380). The effect of this system in relieving traffic congestion and in reducing the cost of commodities is noted by the Board (Findings R. f. 59), and is borne out also in the Findings of the New York Supreme Court in Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144, 151:

"A large amount of duplication of trucking has been eliminated, not to mention the enormous saving of time and expense effected."

We have already pointed out that one of the fundamental purposes of the States in selecting an authority as their instrument of port development, was to insulate the financing of the port program and establish it on a self-liquidating basis. As to the Inland Terminal itself, it is stipulated that the two States (Stip. R. f. 316):

"* * empowered the Port Authority to construct such terminals on a self-liquidating basis as parts of the Comprehensive Plan."

The Port Authority was given power to issue bonds, but was obliged to plan public projects in such manner as would insure sufficient income to meet the expenses of operation and maintenance as well as interest and sinking fund requirements (Findings R. f. 60). Unless the Port Authority could demonstrate to purchasers of its bonds that a particular project was self-supporting, it would be unable to raise the meneys necessary to finance that project, and the terminal system could never be effectuated. On analysis the problem of carrying out the mandate of the two States was found to present these considerations:

- (a) A properly designed terminal required an immense ground area to accommodate a maximum number of trucks around the freight platforms (R. f. 378).
- (b) Manhattan real estate was the most expensive in the world—and the terminal required four acres of it (R. f. 381).
- (c) There was no way of meeting that cost out of terminal operations alone (R. f. 381).
- (d) A one story terminal could not be self-supporting on a \$3,500,000. real estate cost (R. f. 381).
 - (e) Anything in excess of a nominal charge on freight would defeat the entire purpose of the system (R. f. 400).

- (f) The Port Authority had no power to compel the railroads to use the new terminal system (R. f. 399).
- . (g) The railroads would only use the terminal if they could be shown that it would be cheaper for them than their old pier stations (R. f. 381).

In this many-horned dilemma, the only way in which the states could obtain the urgently needed inland terminals on the required self-liquidating basis was to make use of the surplus air rights over the Terminal itself, for the production of incidental revenue (R. f. 383). The Board clearly recognized this when it found (Findings R. f. 60):

"Its construction and rental were deemed necessary to provide sufficient revenue to make the terminal facility economically practical, for the Port Authority received no subsidy for the terminal from the states, and had to raise its \$16,000,000 costs by bonds. To sell the bonds it was necessary to show sufficient prospective revenue from the project to make them attractive."

The findings of fact on this point, made by the Supreme Court of the State of New York in Bush Terminal Co. v. The City of New York, 152 N. Y. Misc. 144, completely paralleled those of the Board below. Incorporated in the New York Supreme Court's decision in that case are these findings:

[&]quot;28. That the construction, operation and maintenance of the upper stories of said Inland Terminal Building was and is vitally and essentially connected with and is a necessary and inseparable part of the construction, operation and maintenance of the Inland Terminal Station on the ground and basement floors of said building and that the Port Authority in the construction of the entire building acted solely in the public interest and in accordance with the mandate and the purposes of the Compact and of the Comprehensive Plan.

[&]quot;29. That the said upper floors are merely incidental to the Inland Terminal Station and that without those floors it would have been economically impossible to construct the Inland Terminal Station, pursuant to the Compact, the Comprehensive Plan and the statutes herein referred to. That the dominant object of the Inland Terminal Building, including the construction of said upper floors, was its use for terminal purposes."

In constructing the Inland Terminal the Port Authority was careful to limit the number of the upper stories so as to produce just enough revenue to meet the inevitable operating deficits of such a public facility, and to place it on a self-liquidating basis (R. f. 383-384). That the Inland Terminal is maintained today purely as a public service is indicated by the fact that, even without any allowance for amortization, it operated in 1935 at a net loss of \$336,361.68 and in 1936 at a net loss of \$39,653.01.1 This despite the incidental revenue obtained from the rental of the upper stories.

Of these upper stories, the two top floors are utilized entirely for the executive, administrative and engineering offices of the Port Authority itself, a use which is, of course, necessary to the performance of its duties (R. f. 459).

The character of the upper stories of Inland Terminal No. 1, as incidental to a governmental purpose, is paralleled by the operations of the Panama Rail Road Company in New York ex rel. Rogers v. Graves, 299 U. S. 401. This Court concluded (p. 404):

"In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; and it is clear that the railroad and ships, after the completion of the canal, continue to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?" (Italics ours.)

Sixteenth Annual Report of the Port Authority to the Governors and Legislatures of the States of New York and New Jersey, page 55.

The parallel of Inland Terminal No. 1 is expressed by the Board below (R. f. 75, 76):

"This is said in respect of the rents from the Inland Terminal Building, more particularly the upper stories * * *. If these were independent profit-making ends in themselves, the argument would be more engaging. But these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of improving the port and terminal facilities of the port district. * * * The Inland Terminal Building was not constructed to produce rent as a profit on investment, but to provide a more efficient terminal and thus expedite traffic and relieve highway congestion."

Interstate Highways.

The enormous task of linking up the highway systems of the two States by vehicular crossings of the Hudson River and the Staten Island Kills was committed to the Port Authority when, in 1920, the New York-New Jersey Harbor Port and Development Commission found (Stip. Ex. B, p. 31):

"Highway communication between different sections of the Port is a part of the problem, * * * and one to which the Port Authority can well give attention. The main thoroughfares must be adequate, as in present instances they often are not, to carry the truck traffic the developments will induce. Where waterways intervene means of crossing them must be found, and this will naturally lead to the consideration of ferries, vehicular tunnels and bridges. Crossing the majority of the wider waters of the Port by any of these means usually involves at least two municipalities directly, while other municipalities more remote from the waters may be prospective beneficiaries of the contemplated improvement. Therefore provision of suitable highway access to the different sections of the Port becomes a problem, and

an important one, for a joint agency such as the Port Authority."

The Comprehensive Plan incorporated this recommendation of the Joint Commission as one of the principles that should govern the development of the Port (Stip. Ex. E, pp. 35-37). The amazing increase of motorized vehicular traffic has intensified the necessity of constructing state highway systems linked by vehicular bridges and tunnels.

In 1923 the Governors of the two States advised the Port Authority that bridges and tunnels linking the highways of New York and New Jersey should be constructed at the earliest possible moment, and that such highway facilities should be constructed by the Port Authority (Findings R. f. 50; Stip. R. f. 288).

Accordingly, the Port Authority went forward with studies of traffic conditions, engineering problems and construction costs; it held public hearings, and finally made full reports and recommendations to the Governors and Legislatures of the two States (Findings R. f. 50; Stip. R. f. 288-290).

In going forward with this program of bridge and highway construction, the Port Authority carried out also an extensive project of express highway facilities both in New York and in New Jersey, linking up the state highway systems with the interstate crossings. These express highways cost \$36,000,000. They are a part of the free public highway systems of both States and are used by both local and

The Port Authority's "Report on Vehicular Tunnels and Bridges", dated December 21, 1933, and rendered to the Governors and Legislatures of the two States, is contained in the Port Authority's Annual Report for the year 1923 (Stip. Ex. G), at pages 43 to 49.

through traffic, as well as by bridge and tunnel traffic. (R. f. 406-410, 469).1

In support of this entire bridge and tunnel program, as well as of all other projects and activities of the Port Authority, the two States have contributed, both in outright appropriations and in advances, over \$20,000,000. For over ten years the two States appropriated \$200,000 a year to the Port Authority's support (Stip. R. f. 324, 325; Compact Art. XV). The Commissioner states (Brief, p. 17) that such sums "were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States." But the very Stipulation reference he gives in support of that statement contradicts it. It says (Stip. R. f. 308, 309):

"The projects of the Port Authority have been financed in part by outright appropriations of the States of New York and New Jersey; in part by direct advances of the States of New York and New Jersey, * * * ."

The George Washington Bridge.

The statutes directing the construction of the George Washington Bridge² recited that this bridge was to be constructed "in partial effectuation of the comprehensive plan for the development of the port of New York," and they

¹ For the convenience of the Court, in making clear the Record references to the location of the Port Authority's interstate crossings and their integration of the highway systems of both States, we have appended to this brief a map entitled "Location of Principal Crossings and Arterial Highways in Port District."

² Chapter 41, Laws of New Jersey, 1925; Chapter 211, Laws of New York, 1925; Chapter 6, Laws of New Jersey, 1926; Chapter 761, Laws of New York, 1926; Stip. R. f. 294; Ex. E, 107, 138, 147, 168.

provided that the bridge should be built and paid for by the issuance of the Port Authority's bonds or other securities pursuant to the Compact. The States granted to the Port Authority the right to use and occupy so much of their real property as might be necessary for the construction and maintenance of the bridge, including the lands under the waters of the Hudson River (Section 6, Chapter 41, Laws of New Jersey, 1925; Section 6, Chapter 211, Laws of New York, 1925). They vested in the Port Authority powers of eminent domain, and each advanced \$250,000 for the making of surveys, engineering studies and other preliminary work (Section 11, Chapter 41, Laws of New Jersey, 1925; Section 17, Chapter 211, Laws of New York, 1925). Subsequently, the States made further advances of \$9,800,000 for construction purposes (Findings R. f. 52; Stip. R. f. 295).

An elaborate system of state highways running back from the bridge head in New Jersey was constructed by the Port Authority, and in New York a system of approach ramps and high speed vehicular tunnels was constructed practically across the width of Manhattan Island (Findings R. f. 52; R. f. 406-410). The total cost of the bridge was \$60,000,000. It was financed, over and above the advances of the two States, by the sale of Port Authority bonds.

The net income of the George Washington Bridge cited by the Commissioner (Brief, p. 10) is entirely consumed in the statutory funds set up by the two States for amortization of the cost of the bridge. When the cost of the project has been met, any revenues must be held for such purposes as may be directed by the two States (Section 2, Chapter 48, Laws of New York, 1931; Section 2, Chapter 5, Laws of New Jersey, 1931; Stip. Ex. K).

Hudson River Vehicular Tunnels.

We have heretofore referred to the construction of the Holland Tunnel by the two States through Joint Commissions (supra, p. 12). In 1930 the States determined that the control and operation of the Holland Tunnel should be vested in the Port Authority as a part of the Comprehensive Plan (Findings R. f. 55-56; Stip. R. f. 303, 304). The tunnel revenues were to be pledged first to raise \$50,000,000 (which the Port Authority did raise and turned in to the two States) to relieve the then pressing burden of taxation. They were, in addition, to be used to support other bridges and tunnels connecting the two States, to be built and operated by the Port Authority. Without these Holland Tunnel revenues the other Port Authority projects could not be self-supporting. (Findings R. f. 56; Stip. R. f. 304-305; R. f. 405, 406).

At the same time, they authorized the Port Authority to proceed with the construction of a new Midtown Hudson tunnel, and agreed upon a policy of group operation of the Port Authority's bridges and tunnels within the Port District. These acts effectuate a bi-State determination that there is but a single traffic movement between the two States in the Port District, and that the movement of vehicles using one bridge or tunnel is facilitated by the existence of every other bridge and tunnel (Findings R. f. 55, 56; Stip. R. f. 304-305).

The first tube of this new Midtown Hudson tunnel (called the Lincoln Tunnel) has just been opened for operation. The States appropriated \$400,000 to the construction of this project. This was an outright appropriation and not a loan, contrary to the Commissioner's statement on page 17 of his Brief. (Findings R. f. 56; Stip. R. f. 306-308). Express highway connections for the Lincoln Tunnel extend for a distance of approximately three miles over the Palisades to connections with the principal state highway systems. These highways were constructed by the Port Authority at a cost of \$19,864,000 and are to be conveyed to the New Jersey State Highway Department. In New York the Port Authority constructed two new metropolitan avenues extending from 34th to 42nd Streets on the west side of Manhattan (R. f. 408, 409).

Funds for the Lincoln Tunnel were, in the first instance, advanced by the Federal Emergency Administration of Public Works, in the amount of \$37,500,000. This loan to the Port Authority was made under an agreement pursuant to which the Federal Government took the position that it was satisfied that the Port Authority was "exempt, under the Constitution of the United States as now in force, from any and all taxation * * * now or hereafter imposed by the United States of America or by the States of New Jersey or New York" (Stip. R. f. 313).

The Staten Island Bridges.

Staten Island is completely isolated from the surrounding mainland by the waters of the Bay and of the various Kills which separate it from the New Jersey shore. The two Legislatures therefore directed the Port Authority to construct

Footnote 6 on page 12 of Petitioner's Brief infers that our statement of this matter is not in accord with the facts of record. We need only refer to the Commissioner's own Stipulation at folio 313 of the Record, and the language of the Loan Agreement, Stipulation, Exhibit L, there referred to, pages 4 and 5. The Stipulation states that the Loan Agreement with the United States required an opinion of Bond Counsel to the effect that the Port Authority's bonds were exempt, as a condition to the purchase of any such bonds by the Government. Section 5a

three vehicular bridges from Staten Island to the Jersey mainland (Findings R. f. 52; Stip. R. f. 290, 291, 297). The States advanced \$8,300,000 toward the construction of these bridges. The remaining \$26,000,000 was raised by Port Authority bond issues (Findings R. f. 51-52).

The net operating loss on these Staten Island Bridges for the years 1931 to 1934, without any consideration of amortization requirements, totalled \$1,311,203.09. These losses, together with the necessary amortization payments, were met ultimately out of the revenues of the Holland Tunnel, under the plan of pooling the revenues of these interstate facilities (Findings R. f. 56; Stip. f. 305; R. f. 416).

The Commissioner attempts to give the impression (Brief, p. 13) that one of the Port Authority's principal functions, coordinate with all of its bridge, tunnel and port development functions, is the operation of a bus across the Goethals Bridge. The fact is that the operation of this bus is of a most trivial and temporary character. Prior to 1931, sev-

of Stipulation, Exhibit L, defines "Bond Counsel" as counsel "satisfactory to the Government". Section 6c of the Loan Agreement states that any requisitions submitted by the Port Authority for purchase by the Government be accompanied by such final opinions of Bond Counsel, as well as by similar opinions of the Port Authority's General Counsel. The Stipulation (R. f. 313) declares that the Government should be under no obligation to purchase any of the Notes unless it was satisfied with those opinions. It further states (R. f. 313) that such opinions were furnished and were accepted by the Government. The Secretary of the Interior indicated the reliance of the Government upon the Hughes Opinion in his address at the dedication of the Lincoln Tunnel. New York Times, December 22, 1937, p. 28.

¹ Since the Commissioner raises the matter (Br., p. 16) we suppose we must explain also that the income which the Port Authority receives from "sales of gasoline, tire changes", consists of service fees to motorists stalled in the Holland and Lincoln Tunnels, where the ventilation problem is such that human life is in danger by blockage of traffic.

eral private buses had been compelled to cease operations over this bridge through "lack of patrenage and financial instability" (Stip. Ex. G; Port Authority Annual Report for 1931, p. 54). In order "to keep the service alive" and "also with a view of keeping employed surplus employees who would otherwise be released" (Port Authority Annual Report, p. 54, supra), the Port Authority bought "three second-hand White buses" and kept the operation going. The Port Authority's Annual Reports show that for the years 1931 to 1935, this service was kept going in spite of annual deficits that ran from \$1,000 to \$9,000. Even these figures are simply operating figures and do not take into consideration the cost of the buses. In 1937 these buses accounted for a net operating revenue of about \$600 as compared with a revenue for all Port Authority facilities of over \$5,500,000, or one one-hundredth of one percent (.01%)! The capital invested in the buses is about \$10,000 as compared with a capital investment in all Port Authority facilities of approximately \$257,000,000 or four one-thousands of one percent (.004%)!

In concluding our statement of the facts, we note that one of the Commissioner's principal points appears to be that the Port Authority should be deemed proprietary because of its receipt of operating revenue (Br., p. 32). Reference to Brush v. Commissioner, 300 U. S. 352, and New York ex rel. Rogers v. Graves, 299 U. S. 401, should be enough to dispose of this contention. (See infra, pp. 53, 54).

Upon the facts found by the Courts below and stipulated by the parties, we therefore submit that there can be no escape from the conclusion reached by the Board below (R. f. 73, 76): "The Port Authority is organized for and operated in the traditionally sovereign function of protecting, improving, and developing the Port of New York; and all its activities are directed to and are incident to that end.

"* * * these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of improving the port and terminal facilities of the port district * * *. The essential question of the preservation of the states' sovereign powers in the interplay of our dual government may not be lost sight of by a pursuit of each detail of the method of exercising it as if it stood alone with a different history and a different purpose."

Summary of Argument.

The Commissioner's brief raises three questions: (1) whether the activities of the Port Authority are proprietary; (2) whether the Port Authority, created by interstate compact, is an agency of the States alone; and (3) whether Federal regulation of interstate commerce impairs the immunity of the Port Authority.

In the following reply on behalf of the Respondents, Points I, II, III and IV are addressed to the Commissioner's first question. Point I presents the direct precedents, particularly the recent decisions of this Court, in support of the constitutional immunity of port and highway development. Points II, III and IV deal with governmental character of the Port Authority's activities de novo, through a pragmatic inquiry into the necessity for its creation, its character as an agency of government, and the tradition and history of governmental development of ports and highways. Point V, answering the Commissioner's second question, defends the sovereign character of state action through inter-

state compact. Point VI shows that Federal regulation of interstate commerce cannot destroy the immunity of state instrumentalities from Federal taxation. Point VII makes it clear that the activities of the Port Authority do not constitute the withdrawal of any normal sources of Federal revenue.

I. All precedents, particularly the recent decisions of this Court, affirm the constitutional immunity of the States in the development of ports and highways. Brush v. Commissioner, 300 U. S. 352, and New York ex rel. Rogers v. Graves, 299 U. S. 401, expressly declare that waterway and highway developments, the functions of the Port Authority, are immune. The Circuit Courts and the lower Courts have unanimously upheld the immunity of these functions.

II. The public purpose which required the creation of the Port Authority proceeded from a determination by the States of New York and New Jersey that a serious port problem threatened the health, safety and standard of living of the people of the Port District. They determined that the problem was the result of conflicting interests and improper coordination of port, terminal and highway facilities; and that its solution required cooperation through a common governmental agency which could go forward with a comprehensive plan of port and highway development.

III. The status of the Port Authority as a governmental instrumentality of the two States is evident from its nature and attributes and from the control which the States exercise over it. It is declared by the States to be "a body corporate and politic", "the municipal corporate instrumental-

ity of the two states", and their "joint or common agency." The Courts have repeatedly determined that it is a part of the machinery of the State governments.

IV. Governments have universally exercised the functions of developing their ports, bridges and highways as traditional governmental duties. All precedents and authorities testify to the exercise of these functions by governments from the earliest times. They are among "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

V. Congressional consent to a compact does not destroy the constitutional immunity of a bi-state agency exercising governmental functions. In entering into a compact the States do not surrender their sovereignty, and an agency so created is no less an agency of the States alone. The requirement of Congressional consent has but the effect of removing a political barrier to the exercise of sovereign powers inherent in the States.

VI. Federal regulation of interstate commerce does not impair the immunity of the Port Authority. The decisions of this Court establish the immunity of many state functions which are nevertheless subject to Federal regulation. To argue that the interstate commerce power destroys state immunity is to confuse the Federal regulatory power with its power to tax for revenue. The operation of an interstate bridge does not constitute interstate commerce. Furthermore, the States are sovereign in interstate commerce where Congress has not preempted the field. The entire constitu-

tional doctrine of reciprocal immunity arises from the fact that there can be no absolute sovereignty in the American form of government.

VII Taxation of the Port Authority would impose a direct financial burden on the two States. The revenues of the Port Authority are State revenues. A Federal tax would prevent the return by the Port Authority of State advances, might compel the States to resume annual port appropriations called for in the Compact, and would reduce the value of the States' ownership of Port Authority properties.

The functions of the Port Authority do not constitute a withdrawal of any normal sources of Federal revenue. In contrast with other instrumentalities which have appeared before this Court, such as the Panama Rail Road Company and the New York Department of Water Supply, the Port Authority takes the place of no former taxpayer.

POINTS OF LAW.

POINT I.

All precedents, particularly the recent decisions of this Court, affirm the constitutional immunity of the States in the development of ports and highways.

There would appear to be no necessity at this Term of the Court to restate the accepted principles of constitutional immunity which prevent the States from taxing the Federal Government, and the Federal Government from taxing the States, their instrumentalities and agencies. Each of the decisions in this field handed down during this Term has

emphasized the Court's acceptance and affirmance of that doctrine as a basic constitutional necessity "in order to maintain the essential freedom of government in performing its functions." James v. Dravo Contracting Co., 82 Law. Ed. Adv. Ops. 125, 134; Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537; Helvering v. Mountain Producers Corporation, No. 600, October Term, 1937, decided March 7, 1938.

We therefore take it as the law of this Court that an employee of an instrumentality of state government, engaged in the performance of a governmental function, is immune from Federal taxation; that the principle is reciprocal to state and federal governments; and that where it applies it is absolute.

A constitutional issue cannot be more definitely settled than is the issue here, by the authorities relied on as conclusive in the opinion of the Circuit Court below. Brush v. Commissioner, 300 U. S. 352, and New York ex rel. Rogers v. Graves, 299 U. S. 401, are complete authority for the principles upon which the Circuit Court rested its decision. They are decisive because (a) they expressly assume the immunity of that class of functions in which the Port Authority is engaged—waterway and highway development, and (b) they suggest tests to determine the governmental character of

¹ McCulloch v. Maryland, 4 Wheat. 316 (1819); Dobbins v. Commissioners, 16 Pet. 435 (1842); Collector v. Day, 11 Wall. 113, 125, 127 (1870); New York ex rel. Rogers v. Graves, 299 U. S. 401 (1937); Brush v. Commissioner, 300 U. S. 352 (1937).

² Collector v. Day, supra; New York ex rel. Rogers v. Graves, supra; Brush v. Commissioner, supra.

⁸ Collector v. Day, supra, at page 127; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 584; South Carolina v. United States, 199 U. S. 437, 451, 452.

state or federal functions which definitely place the Port Authority within the line of "historical and judicial inclusion."

Brush v. Commissioner, 300 U. S. 352, was a reversal of a Circuit Court decision. Though the Circuit Court had denied the immunity of the City of New York in providing its people with a public supply of potable water, that Court had not the slightest doubt as to the governmental immunity of a state agency engaged in port development. It said (85 F. (2d) 32, 35):

"* * * the furnishing of water has been classed as nonessential to the exercise of governmental functions. * * * Our decision in Commissioner v. Ten Eyck, 76 F. (2d) 515, was controlled by the traditional supervision exercised by government over sea ports and stands apart from the decisive features here."

So too, when the case came to this Court, the opinion selected as a typical example of an immune governmental function the construction and operation of a highway—one of the principal functions of the Port Authority.

"A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it * * *; but this does not destroy the claim that the maintenance of the highway is a public and governmental function." Brush v. Commissioner, 300 U. S. 352, 372.

Even the dissenting opinion in the *Brush* case is, we submit, instinct with recognition of the immunity of such functions as port and highway development. The dissenting Justices were of opinion that municipal waterworks should be

¹ Point I has to do only with reason (a). The application of the tests suggested in reason (b) is treated in Points II, III and IV.

taxed, because they considered them (p. 377) to be a "state business" which "ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business." It would appear that the Justices had in mind the widespread private development of waterworks. But certainly the very converse is true in the development of ports, bridges and highways. In the language of the dissenting Justices, these functions "have no analogue in the conduct of a business * * * but are both peculiar to and essential to the operation of government." There is no comparable private "business" of port and highway development to invite cost comparison. See Sherman v. United States, 282 U. S. 25, 29.

In New York ex rel. Rogers v. Graves, 299 U. S. 401, the Court held immune the great waterway development of the Federal Government—the Panama Canal. It held also immune the Panama Rail Road Company, the operations of which include the provision of harbor terminal facilities at the ports at Colon and Panama City. In these cases, the States of New York and New Jersey present the case for the immunity of their greatest waterway development—the Port of New York.

In the Rogers case, the Court expressly joined canal, waterway, bridge and highway development as immune governmental functions (pp. 404, 406):

"The question, therefore, to be answered is whether the canal is such an instrumentality of the Federal Government as to be immune from state taxation; * * *.

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium

¹ Annual report of the Secretary of War, 1937, page 18.

by and through which commerce is regulated, since such creation and use condition and facilitate transportation."

In his opinion of November 10, 1935, Hon. Charles Evans Hughes refers to the statutory declaration of the two States that "the port authority shall be regarded as performing a governmental function", and declares:

"this declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established. In this view, the bonds issued by the port authority will be on the same footing as state and municipal bonds issued for governmental purposes and are not subject to taxation by the Federal Government (Collector v. Day, 11 Wall. 113; * * *)."

There has been no more thorough judicial exposition of the governmental nature of port and harbor development by state agencies than that contained in the opinion of the Circuit Court of Appeals in Commissioner v. Ten Eyck, 76 F. (2d) 515. The Court reviewed the universal acceptance, both by the Federal and the State governments, of the development of ports and navigable waters as essentially governmental (p. 517); it showed that historically and universally port

Furthermore the Rogers case firmly established the authority of government to select any instrumentality it chooses and pointed out that from the immunity of such instrumentality "it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune" (p. 408). This statement of the Court in so recent a case is sufficient in itself to dispose of the question reserved by the Commissioner and numbered "(4)" on page 22 of the Government's Petition for Certiorari; whether, "if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax."

² N. Y. Laws of 1925, Chap. 210, Sec. 7; N. J. Laws of 1925, Chap. 37, Sec. 7.

activities were and are the usual subject of governmental operation and control (p. 518); it reviewed the judicial authorities that had held them such and discussed The Port of New York Authority itself as an example of the "importance, as a governmental desire, of the proper development and operation of the Port of New York" (p. 518). The Circuit Court concluded (pp. 517, 519):

"Port and harbor developments have long been regarded as governmental functions in providing for the

welfare and prosperity of the people * * *.

"The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not withdrawing sources of revenue from the federal taxing power."

The Commissioner recognizes and admits that there is no conflict in the decisions upholding the immunity of port, bridge and highway development as sovereign functions of the States. They are unanimous. The Circuit Courts of Appeals for the First and Ninth Circuits, and for the District of Columbia, are in full accord with the decisions of the Second Circuit, as are the District Court decisions and the entire series of decisions of the Board of Tax Appeals.

The Circuit Court of Appeals for the First Circuit in Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920, 923, held a municipal ferry immune because as the Court said, it "was, in function, not distinguishable from a bridge or other necessary portion of a highway".

In 1922, the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *King County, Wash.*, 281 Fed. 686, upholding the immunity of the county ferry, said (p. 688),

"We understand it to be the duty of the government, whether national, state, county, or city, to provide suit-

able roads, bridges, and ferries for the convenience of the public, and that when such a government undertakes to do so, and to itself operate them, it is in the exercise of a strictly governmental function."

And, in 1935, the same Circuit Court held that an employee of the Golden Gate Bridge and Highway District was immune, Commissioner v. Harlan, 80 F. (2d) 660, saying: "That the maintenance of highways, and consequently of bridges and ferries connecting the same, by the government or its subdivisions, is the exercise of an essential governmental function is so well established that we content ourselves with a reference to a few of the numerous decisions to that effect."

Similarly, the Court of Appeals for the District of Columbia, in Halsey v. Helvering, 75 F. (2d) 234, 235, held:

"* * the official duty of the taxpayer as township engineer was to advise the town government in all engineering matters, specifically including the construction, maintenance, and alteration of streets and ways,

"We are of opinion that such work is essentially a governmental function, and the compensation paid by the township to its officers engaged therein is properly exempt from federal taxation."

Most recently the District Court for the Western District of Kentucky, in Boomer v. Glenn, 21 F. Supp. 766 (1938) upholding the immunity of an employee of the Louisville Bridge Commission, pointed out that "The construction and maintenance of highways and bridges as a governmental function is one of the most ancient known to the law having had its beginning prior to the civil or common law. * * * This case falls clearly within Brush v. Commissioner, 300 U. S. 352."

The decisions of the Board of Tax Appeals upholding the immunity of the employees of the port, harbor, bridge and highway Authorities and Commissions are: Moisseiff v. Commissioner, 21 B. T. A. 515; Modjeski v. Commissioner, 28 B. T. A. 1051; Fitzgerald v. Commissioner, 29 B. T. A. 1113; Harlan v. Commissioner, 30 B. T. A. 804; Carey v. Commissioner, 31 B. T. A. 839; Hittell v. Commissioner, 33 B. T. A. 276; Case v. Commissioner, 34 B. T. A. 1229, (the instant case below); Wait v. Commissioner, 35 B. T. A. 359; Platt v. Commissioner, 35 B. T. A. 472.

In the Brush and Rogers cases this Court considered and rejected every argument advanced by the Commissioner on this point. Yet, in spite of those decisions the Commissioner persists in making the argument that the Port Authority is proprietary (a) because it is engaged in a "transportation service" (Brief, p. 32); and (b) because it charges tolls for the services it renders, from which it derives revenues to repay the cost of its projects—here labelled "profits" (Brief, pp. 32-35).

We concede that it may properly be said that the Port Authority furnishes a transportation service to the public, and that its bridges and tunnels are transportation facilities. Transportation is, of course, of the essence of port development. However, we can imagine no better phrase than "transportation facility" to describe the Panama Canal, or the railroad and steamships of the Panama Rail Road Company. That phrase describes state highways, though their operation is declared, in the Brush case, to be a governmental function. It describes, too, the operation of the Federal and State canal systems, and is a perfect characterization of the work of the Post Office Department.

The Commissioner, of course, exerts every effort to apply Helvering v. Powers, 293 U.S. 214, to these cases. The distinction is obvious. In the Powers case, the Court was dealing with the operation of an elevated railroad which had theretofore been privately operated, and which was to be returned to private operation and to the ownership of its private security holders after ten years of municipal operation. Even more broadly, Chief Justice Hughes in the Powers case makes it clear that the Court limits the immun state operation of such transportation facilities to those in which the state is "undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions * * *." Here there is involved no "business." When Mr. Justice Holmes considered the port development activities of the California Board of State Harbor Commissioners in the development of the Port of San Francisco, he said:

of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the state to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a state prerogative." Sherman v. United States, 282 U. S. 25, 29.

The *Powers* case has, therefore, no application to the governmental development of waterways and highways, functions expressly declared immune in the *Brush* and *Rogers* cases.

"Neither Ohio v. Helvering, 292 U. S. 360, nor Helvering v. Powers, 293 U. S. 214, relied upon by respond-

ent, is in point. What has already been said distinguishes those cases from the one now under consideration" Brush v. Commissioner, 300 U. S. 352, 373.

The Powers case was expressly distinguished from port development cases by the Courts below (R. f. 75, 76. See also R. f. 481, citing Commissioner v. Ten Eyck, 76 F. (2d) 515). In the Ten Eyck case, the Court, after referring to Helvering v. Powers, said (p. 519):

"It is the entrance into a trade enterprise that distinguishes these cases, relied upon by the petitioner. It cannot be maintained that there is involved in the instant case a trade or business, entered into for profit, constituting a proprietary enterprise."

The factual differences between the "transportation facilities" held immune in the Brush and Rogers cases, and the "transportation facility" held taxable in the Powers case, are brought out also in Points IV and VII of this brief. These differences lie principally in the governmental history and universality of the function, and in the fact that, in the case of the Port Authority, there is no withdrawal of established sources of Federal revenue.

The Commissioner suggests (Brief, pp. 34, 35) that the collection of tolls and revenues makes the Port Authority proprietary, though he admits at the same time, that "the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. * * * to facilitate the flow of traffic through the District." He expands this argument into the contention that the Port Authority is "selling" transportation service for "profit." We need only point out in the language of this Court that:

"Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. * / * * to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized. A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (See Bingaman v. Golden Eagle Western Lines, 297 U. S. 626); but this does not destroy the claim that the maintenance of the highway is a public and governmental function. * * * The federal Post-Office Department charges for its services; but no one would question the fact that its operation calls into exercise a governmental function." Brush v. Commissioner, 300 U. S. 352, 372, 373.

See also New York ex rel. Rogers v. Graves, 299 U. S. 401, and Commissioner v. Ten Eyck, 76 F. (2d) 515, 519.

The contention that the Port Authority earns "profits on a grand scale" is totally incorrect. The figures which the Commissioner refers to are simply net income over and above operating and interest charges on a public investment of over \$250,000,000. They are entirely consumed in amortizing the cost of these designedly self-liquidating public works. (See R. f. 53). The Annual Reports of the Port Authority show that the net income was insufficient, in any of the years referred to, to return the advances which the Port Authority In fact, estimates of has received from the two States. future traffic indicate that revenues will be barely sufficient to meet sinking fund requirements. If there were any surplus over and above amortization requirements, it would be held subject to the absolute disposal of the two States (Stip. Ex. K; Laws of New York, 1931, Chap. 48; Laws of New Jersey, 1931, Chap. 5).

As we have heretofore noted, a great portion of the Commissioner's presentation of the activities of the Port Authority is addressed to the operation of the Goethals Bridge buses and the upper stories of the Inland Terminal. As to the trivial nature of the bus operation, nothing further need be added (supra, pp. 39, 40). The incidental character of the upper stories of the Terminal have also been fully developed in our presentation of the facts (supra, pp. 32, 33). They are to be considered not as things apart but in their relation to the entire port and highway development Plan.

The cases are in accord that, once it is shown that the primary function is governmental, the incidents necessary to the effectuation of that function are also entitled to immunity. Since port and harbor development are governmental functions, this Court has written the answer to the Commissioner's entire contention as to the upper stories of the Terminal, when, in New York ex rel. Rogers v. Graves, 299 U. S. 401, 406, the Court said:

"Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves co-operating regulators—or, perhaps, more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the interrelation of the railroad company's activities with the management and operation of the canal."

Recent reports indicate that these facilities, there held immune, reported a net income to the United States of \$1,519,629. This income helped to offset the Government's loss in the operation of the Canal itself. The facts here show that

¹ Annual Report of the Secretary of War, 1937, at page 19.

the upper stories of the Terminal are operated solely as an incident of the Terminal itself and as a source of incidental revenue designed to make the Terminal self-liquidating. In the words of this Court (299 U. S. at 407):

"We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations."

So, also, in Brush v. Commissioner, 300 U. S. 352, 371, the Court said:

"Certainly, the maintenance of public schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned, the water supply is a necessary auxiliary, and, therefore, partakes of their nature. New York ex rel. Rogers v. Graves, 299 U. S. 401."

The same conclusion was reached by the Circuit Court of Appeals in Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, 519, and by the New York Supreme Court in Bush Terminal Co. v. The City of New York, 152 N. Y. Misc. 144, 155, 156.

POINT II.

The public necessity which required the creation of the Port Authority was the necessity of joint State action in the development of their port and their interstate highways.

Point I presented the arguments for the immunity of the Port Authority strictly from the standpoint of precedent. However, even if there were no decisions in point, the same conclusion is reached de novo, by applying the pragmatic method of inquiry which this Court adopted in the Rogers and Brush cases and, more recently, in Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537. "We said that what is a public use may depend on the facts surrounding the subject; * * *" (Brush v. Commissioner, 300 U. S. 352, 366, 367). As we read those cases, there are three major questions—three principal lines of factual inquiry—considered and followed by this Court in arriving at a decision as to whether a given function is governmental or proprietary. They are:

- (a) What were the public necessities which required State or Federal action?
- (b) Is the agency selected truly an instrumentality of government?
- (c) To what extent have governments exercised the function?

To these three lines of inquiry we therefore address Points II, III and IV of our brief. The Commissioner (Brief, p. 35)

¹ The Commissioner rejects these factual tests. In their place, he attempts (Brief, p. 41) to raise the adjectival method which we had thought was disposed of in *Brush* v. *Commissioner*, 300 U. S. 352, 361.

disputes the value of our first inquiry, that with regard to the public necessities and purposes for the creation of the Port Authority. Obviously, that inquiry alone will not answer the question. However, we propose to follow it, just as did this Court in the *Brush* and *Rogers* cases, as one of the three basic elements which, when taken together, establish the governmental nature of any activity of a state agency.

In answer to the first inquiry, therefore, we submit that the public necessity which required the creation of the Port Authority was the necessity for joint State action in the development of the Port of New York. As clearly appears from the Findings and the Stipulation herein, the States of New York and New Jersey were faced with a public problem which not only demanded solution but required joint state action. The Courts below found as a fact (Findings, R. f. 46):

"This Compact, which amended and supplemented a former one entered into between New York and New Jersey in 1834, was induced by the necessity, widely recognized, for joint state action in the development as a whole of the Port of New York, which lies partly within the jurisdiction of each state."

The history of events preceding and leading up to the creation of the Port Authority make it clear that such a finding of necessity was inescapable (supra, pp. 9-16). Accordingly, it is stipulated herein (Stip. R. f. 278) and the Commissioner's Brief (p. 3) concedes that

"It has long been recognized that a coordinated development of the port was necessary and that this could not be accomplished by separate action of the two states." (Italics ours.)

It is stipulated that in 1916 the two States "found themselves faced with the problem of the Port's future develop-

ment" (Stip. R. f. 278). It is stipulated that the New York Harbor Case, 47 I. C. C. 643, "aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desirability of unifying the port's transportation system, and such efforts as might be desirable upon the part of both states to effectuate the reorganization" (Stip. R. f. 279). And it is stipulated that the Port and Harbor Development Commission "thoroughly carried out" its survey and recommended "an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two states" (R. f. 280). Finally, the Commissioner (Brief, pp. 34, 35) affirms that "the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. * * * it may be admitted that a basic purpose of the Port Authority's creation and of the operation of the bridges and tunnels is not to earn profits but to facilitate the flow of traffic through the district."

The necessities requiring State action were stated by the Report of the New York State Joint Legislative Committee on State Fiscal Policies, submitted to the Legislature December 27, 1937 (p. 82):

"The first important authority established in this country was The Port of New York Authority, which was created by joint action of the States of New York and New Jersey and was called into being because of the necessity of performing certain public functions within a single economic unit, which unit, however, was hopelessly divided by political jurisdictions."

Governor Lehman, in his Annual Message to the Legislature, on January 1, 1936, summed up the governmental necessity for the creation of the Port Authority as follows:

"In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the *imperative demand* for a continuing body with ample powers to meet the problems arising out of commerce and the operations of the two states lying within the Port District." (Italics ours.)

The observations of the Circuit Court of Appeals on the necessity for the creation of the Port Authority are expressed in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 518:

"The necessity of a comprehensive plan for the organization and development of port facilities in the principal harbors of this country has been recognized, and steps have been taken to vest in the control of properly constituted governmental agencies the future development of many of its ports. * * * It resulted in the creation of the Port of New York Authority. This action was a recognition of the importance, as a governmental desire, of the proper development and operation of the Port of New York." (Italics ours.)

In Brush v. Commissioner, 300 U. S. 352, this Court found that the purpose of the City's Department of Water Supply was the conservation and distribution of an adequate supply of pure and wholesome water for "the health and comfort of the city's population of seven million souls" and "as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants" (p. 371). The necessities which compelled action by the two States in the solution of their port problem are a close parallel. The Port Authority, too, was created to "protect the health, safety and lives of its inhabitants." The declaration of the two States is (Sec. 14, Chap. 4, Laws of New Jersey, 1931 and Sec. 14, Chap. 47, Laws of New York, 1931):

"The construction, maintenance and operation of vehicular bridges and tunnels within the said Port of New York District * * * are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto, and shall be required to pay no taxes or assessments upon any of the property acquired or used by it for such purposes."

Of this same language in an earlier Port Authority statute, the Hon. Charles Evans Hughes, in his opinion of November 10, 1925, said: "This declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established." His conclusion as to the necessity for the creation of the Port Authority was that

"Its creation was due to the need of the co-operation of the two States in the development and co-ordination of the terminal, transportation and other facilities of commerce in the territory in and around the port of New York."

In New York ex rel. Rogers v. Graves, 299 U. S. 401, the Court, after reviewing the necessity for the ownership of the

¹ This determination by the State Legislatures proceeded from a factual investigation by a joint State Legislative Commission (Stip. Ex. B). ''Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility.'' This Court merely examines ''the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis.'' South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469, 477.

Panama Rail Road Company by the Government in connection with the Canal, concluded that the public health, the making of sanitary rules and regulations, the national defense and the regulation of commerce, all required such governmental ownership. Every single one of these factors is paralleled in the public necessity which led to the creation of the Port Authority. (See Stip. Ex. B, p. 35). The Court found that the public necessity for the construction of the Canal and the acquisition of the Panama Rail Road included the regulation of commerce. The Court included bridges and highways in this finding as to the governmental character of waterways, saying (p. 406):

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation." (Italics ours.)

The inclusion of such a purpose within the necessity for the creation of the Port Authority, was announced by the States in the Port Compact (Stip. Ex. E, p. 13):

"* * * It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the States of New York and New Jersey."

The impossibility of coordinating conflicting port interests and effectuating a comprehensive plan of port development save through the offices of a governmental agency, is evident from the record here (R. f. 398). It was this very inability of private enterprise, or even of the two States acting separately, to achieve adequate development of the port, which led to the dangers pointed out in the New York Harbor Case, 47 I. C. C. 643. When the two States entered into their Port

Compact, they declared, after a recital of its purpose, that (Stip. Ex. E, p. 13):

"* * Such result can best be accomplished through the cooperation of the two states by and through a joint or common agency."

This determination was clearly within the province of the two States.

"* * if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions" Brush v. Commissioner, 300 U. S. 352, 371.

In the final analysis, the action of the States in creating the Port Authority was the result of the conviction of the Governors and Legislatures of the two States that the problem was so intimately bound up with the public welfare as to make unthinkable any solution by other than a direct instrumentality of the two States.

POINT III.

The Port Authority is the governmental instrumentality of the States of New York and New Jersey.

We have stated as the second of the three principal inquiries (supra, p. 57) made in the Rogers and Brush cases, in determining whether an agency is performing governmental functions:

Is the agency selected truly an instrumentality of government?

Most recently in James v. Dravo Contracting Co., 82 Law. Ed. Adv. Ops., 125, 138, the Court said "that the nature of

the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption." The court pointed out that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the government "that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power." The Court said that "it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function,' was prohibited."

The status of the Port Authority as just such a governmental instrumentality becomes clear from a consideration of its very nature and attributes and from the control which the States exercise over it.

Inquiry into the governmental character of the Port Authority is answered by the declarations of the two Legislatures and of the Congress, that the Port Authority is "the joint or common agency" of the two States, "a body corporate and politic" and the "municipal corporate instrumentality" of the States (Stip. Ex. E, pp. 13, 43).

Congress itself has recognized the governmental character of such municipal corporate instrumentalities.¹ The

The securities of agencies of just this type are expressly exempted from the provisions of the Securities Act (15 U. S. C. A., Sec. 77[c], par. 2), and of the Securities and Exchange Act (15 U. S. C. A., Sec. 78(c) [12]). The Public Works Administrator made the same determination under 40 U. S. C. A. Sec. 403(a) (2). On November 21, 1934 the Comptroller of the Currency ruled that national banks might purchase Port Authority securities under the statutory language "general obligations of any state or of any political subdivision thereof."

state courts have repeatedly found that port authorities, by reason of their very nature and powers, are municipal corporations and governmental instrumentalities. Rosen-kranz v. City of Evansville, 194 Ind. 499, 143 N. E. 593; State v. Port of Astoria, 79 Ore. 1, 154 Pac. 399; Stevenson v. Port of Portland, 82 Ore. 576, 162 Pac. 509. In Commissioner v. Ten Eyck, 76 F. (2d) 515, 518, the Court said of the action of the two States in creating the Port Authority:

"They joined in an agreement for the creation of a governmental agency * * *" (Italics ours).

The powers, privileges and immunities of the Port Authority are those of an instrumentality of government completely integrated into the governmental systems of the two States. It is unnecessary here to detail these powers and immunities. They are all stipulated (Stip. R. f. 284, 285; R. f. 322-332) and are found as facts by the Board below (Findings, R. f. 67-69). They are set forth in detail in the brief submitted by New York, New Jersey and other States as Amici Curiae (See Point III of that brief).

At the outset of Point I of the brief sulmitted on behalf of the Commissioner, it is argued that the separate corporate entity of the Port Authority is of significance in this case. We would have thought that any significance which might ever have attached to such a contention was disposed of by McCulloch v. Maryland, 4 Wheat. 316; New York ex rel. Rogers v. Graves, 299 U. S. 401; and Brush v. Commissioner, 300 U. S. 352. In each of those cases the agency involved was a separate corporate entity—the Bank of the United States, the Panama Rail Road Company, and the City of New York. The activities of each were held to be normal governmental functions. In pursuing this argument, the Commissioner says that the revenues of the Port Authority

"belong to it alone" (Brief, p. 31). On the contrary, all Port Authority revenues are held subject to the absolute direction of the two States¹ (Stip. Ex. K; Laws of New York, 1931, Chap. 48; Laws of New Jersey, 1931, Chap. 5). The Commissioner says also that the Port Authority's "operations are subject to no control by the executive branch of either State" (Brief, p. 32). On the contrary, it is stipulated that the Governor of each State has a veto power over the acts of each Commissioner from his State (Stip. R. f. 323). The minutes of each meeting of the Port Authority are submitted to the Governor of each State for his approval. The Commissioners are appointed by the Governors, with the advice and consent of the respective States' Senates, and are removable, in the case of New Jersey by the State Senate, and in the case of New York by the Governor (Stip. R. f. 323).

The States chose the Port Authority as the more efficient alternative to their own performance of their sovereign functions in the development of the Port. They were thus able to achieve the substitution of an economic for a political boundary line, to avoid the problem of dual sovereignty, the huge increase in the state debt, and to establish a permanent body not affected by political changes which so often obstruct long range planning. In the words of Mr. Justice Holmes, "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends". Clallam v. United States, 263 U. S. 341, 345.

As Governor Lehman of New York said in his Annual Message to the Legislature, January 1, 1936:

¹ Of course, the pledge of revenues to the payment of bonds and interest is a direction of the States. Sec. 11, Chap. 4, Laws of New Jersey, 1931; Sec. 11, Chap. 47, Laws of New York, 1931.

"In certain instances an authority may well be a sound and reasonable method by which to reach a desired end. Equally true, an authority such as the Port of New York Authority may be the only suitable agency."

The Commissioner suggests (Brief, p. 19) that in the event of liquidation or dissolution of the Port Authority, there is no statutory provision "for the reversion of its properties and facilities to either or both of the two States". Aside from the fact that title to the Holland Tunnel is held directly by the two States, it is obvious that such ownership as the Port Authority has, is strictly limited by its legal position as the agent and trustee for the two States.1 The States could, at any time, by joint action dissolve the Port Authority and take over the properties directly. "There is no stock and are no stockholders, the Port Authority not being owned or controlled by any private persons or corporations" (Stip. R. f. 342, 343), Such dissolution would revest both States directly with all the assets which the States now have indirectly in the name of the Port Authority. The old Holland Tunnel Commission was just such a joint agency ' of the two States. Upon its dissolution the control, operation and management of its properties was disposed of in accordance with the directions of the two States (Chap. 47, Laws of New York, 1931; Chap. 4, Laws of New Jersey, 1931).

Both State and Federal Courts have repeatedly found the Port Authority to be the agent of the States. The utterances of the Circuit Court in Commissioner v. Ten Eyek, 76 F. (2d) 515 have already been referred to. The Circuit Court

⁴ We note the legal development of this principle of fiduciary relationship in the field of public law. Williamsburgh Savings Bank v. State, 243 N. Y. 231. There the Court of Appeals upheld the State's moral obligation to repay the bonds of such agencies in case of default.

for the Third Circuit in City of Newark v. Central R. R. Co. of N. J., 297 Fed. 77, similarly referred to the Port Authority as a governmental body. The Board of Tax Appeals so found not only in the instant cases, but also in Moisseiff v. Commissioner, 21 B. T. A. 515, and Carey v. Commissioner, 31 B. T. A. 839. The New Jersey Court of Chancery so held in New Jersey Interstate Bridge & Tunnel Commission v. Jersey City, 93 N. J. Eq. 550, and State Highway Commission v. Elizabeth, 102 N. J. Eq. 221. The New York Court of Appeals so referred to the Port Authority in Gaynor v. Marohn, 268 N. Y. 417; and the New York Supreme Court so held in The Port of New York Authority v. Lattin, N. Y. Law Journal, Dec. 3, 1930; Boyle Holding Corp. v. Medgreen, 154 N. Y. Misc. 189, and Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144.

Most recently the Supreme Court of the State of New York held the Port Authority to be immune from suit on the ground that "it was created by treaty between the States of New York and New Jersey and is thus clothed with sovereign immunity." Pink v. The Port of New York Authority, N. Y. Law Journal, Feb. 3, 1938, page 567. Even as this brief is written, the New York Court of Appeals in Buffalo and Fort Erie Public Bridge Authority v. Davis, decided March 8, 1938, again referred to its classification of the Port Authority and other Authorities as state agencies. The same view has always been held by the Attorneys General of both the State of New York and the State of New Jersey. It is the con-

¹ Attorney General Newton, opinion of May 12, 1921; Attorney General Bennett, opinions of February 25, 1931, March 10, 1932 and February 8, 1934.

² Attorney General Katzenbach, opinion of March 5, 1925, to the Governor of New Jersey.

clusion reached by the United States Government itself, through its Comptroller of Currency¹ and its Public Works Administration.²

The second line of inquiry pursued in the Rogers and Brush cases—"Is the agency selected truly an instrumentality of government?"—must therefore be answered in the affirmative.

POINT IV.

Governments have universally exercised the function of developing their ports, bridges and highways as a traditional governmental duty.

The third and final inquiry (see *supra*, p. 57) suggested by the opinions of this Court in the *Rogers* and *Brush* cases is:

Have governments traditionally and universally exercised the function?

Thus, in the *Brush* case, the Court made a factual examination into the extent of the exercise of governmental power in dealing with the distribution of water, both for purposes of irrigation (300 U. S. 352, 366, 367), and in the protection, ownership and distribution of domestic water supply in urban centers (pp. 368-370). And in the *Rogers* case, the

The Treasury Department, in a letter of April 4, 1934, from the Comptroller of the Currency to Messrs. Shearman and Sterling of New York City, declares that the Port Authority "is a body corporate and politic created between the States of New York and New Jersey and is a municipal corporate instrumentality of the two States."

² Stip. R. f. 313.

Court considered "the contemporaneous and long-continued administrative practice" that had established the Panama Rail Road Company as a governmental auxiliary of the Canal (299 U. S. 401, 406). The same inquiry is suggested in Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537.

Addressing this inquiry to the activities of the Port Authority, we submit that governments have traditionally exercised the function of developing their ports, harbors, highways, bridges and tunnels. These are functions which governments, and particularly our state governments, have always discharged as sovereign duties:

"Cities have long exercised the power: to acquire, construct, maintain, control, supervise and regulate docks, wharves, and harbor facilities, including the making of river and harbor improvements in connection therewith; to own and operate ferries; to lay out and improve roads and highways; and to construct and maintain canals, bridges and other works of internal improvement of a public character." Dysart v. City of St. Louis, 11 S. W. (2nd) 1045, 1049 (Sup. Ct., Mo.).

These are "duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution". Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537, 540. National defense, the flow of commerce, and the health, welfare and prosperity of the people are among the basic concerns which have made such governmental control essential. The Commissioner cannot but recognize this. He says (Brief, pp. 62, 63):

"We readily agree that the Port Authority is performing services of great benefit both to the states and to the

nation. We readily agree that its activities, in building bridges and in developing the port, are appropriate fields for state action sanctioned by long usage." (Italics ours.)

1. PORT AND HARBOR DEVELOPMENT.

This Court has indicated that the development of ports and harbors is one of the high governmental duties of the states. Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 452. See also Williams v. Mayor, 105 N. Y. 419, 436; Ferguson v. Ross, 126 N. Y. 459; Matter of Mayor of the City of New York, 135 N. Y. 253, 262.

From the earliest times these "gates of the realm" have been under governmental control. Under the common law, the ownership of the soil under all navigable waters was vested in the sovereign as parens patriae for the benefit of all his subjects. Thus, the people at large were entitled to the free use of the sea and all navigable waters for navigation, fishing and commerce, subject to the regulation and control of the government. Appleby v. New York, 271 U. S. 364, 382; Lansing v. Smith, 4 Wend: (N. Y.) 9. In the civil law, under the jurisprudence of Justinian: "Also all rivers and ports are public." Institutes, 2, t. 1, s. 1.

In the Seventeenth Century, Lord Hale, in his treatise "A Narrative Legall and Historicall Touchinge The Customes" under "Caput Primum—Concerninge The Ports, Theyr Natures and Originalls," wrote:

"So that in truth as a city or borough or colledge denote an artificiall aggregate nature or franchis, so doth a port denote a place not only where shipps naturally may but civilly and legally may come and unlade and relade." (See Stuart A. Moore's History of The Foreshore and The Law Relating Thereto (1888) p. 320.)

Holdsworth, in his "History of English Law" (Volume 2, p. 467), tells us that in the early days of England,

"Good roads were almost non-existent, and therefore the maintenance of a free passage by river was a matter of the first importance. From Magna Carta onwards, numerous statutes provided for the removal of weirs and other obstacles to navigation. 25 Edward III. St. 3 c. 4; 45 Edward III. c. 2; 1 Henry IV. c. 12; 4 Henry IV. c. 11; 9 Henry VI. c. 9; 12 Edward IV. c. 7."

The control of the Thames, along with all other waterways in the kingdom, was in early times vested in the Crown. In the early part of the Twelfth Century, however, the King's jurisdiction was shared in some measure by the Corporation of the City of London. Typically enough, in the light of English history, the municipal corporation gradually attained full jurisdiction of the Port of London. This development is set forth in "The Port of London Yesterday and Today" (1927), by D. J. Owen, at page 16, which continues:

"The Charter of King James I stated that the Mayor, commonalty and citizens of London time out of mind had exercised the office of bailiff and conservators of the water of the Thames. The third Charter (1615) contains the true and weighty words, 'It is notoriously known that the river of Thames is so necessary, commodious and practicable to the said City of London and without the said river our City would not long subsist, flourish and continue.' The functions of the Corporation in course of time extended to include, amongst other things, the regulation of shipping, the fixing of mooring posts in the river, the direction of the methods of removing ballast, the repairing of the banks, the levying of rents for projections into the stream, the licensing of wharves, jetties and landing places, and the periodical official inspection of the river."

Both in Scotland and in England the right to erect a port was part of the royal prerogative. No port could exist except under the authority of the sovereign. Blackstone says:

"By the feodal law all navigable rivers and havens were computed among the regalia, and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm;" Blackstone, Commentaries on the Laws of England, edited by William Draper Lewis (1898) Book 1, page 264.

Control of customs was by no means the only reason for the exercise of the King's prerogative with respect to the designation and control of the facilities of the port. It was recognized that foreign trade and commerce would not be carried on and stimulated if left wholly to the control of private individuals who would naturally seek to create monopolies in the use of wharves and other facilities. Certain quays and other terminal facilities were always declared by the Crown to be open for use by the general public at reasonable charges, and in many cases these facilities were constructed and operated by the Crown itself.

In Shively v. Bowlby, 152 U. S. 1, this Court reviewed the common law history of rights in navigable waters and showed clearly that not only the waters themselves, but wharves and other landing places were regarded as parts of the public water highway over which the Crown exercised

Hunter v. Northern Mar. Ins. Co., L. R. 13 A. C. 717; Sailing Ship "Garston" Co. v. Hickie & Co., L. R. 15 Q. B. D. 580; Mayor of Yarmouth v. Eaton, 3 Burr. 1402; Jenkins v. Harvey, 1 C. M. & R. 877; Lord Falmouth v. George, 5 Bing. 286; Attorney General v. Richards, 2 Anst. R. 603; Foreman v. Free Fishers of Whitstable, L. R. 4 H. L. 266; Case of London Wharfs, 1 Sir W. Blackst. 581; Hale, De Portibus Maris; Gould on Waters, 3rd Ed., pages 11, 12.

jurisdiction for the benefit of the people as a whole. See also Kerr v. W. S. R. R. Co., 127 N. Y. 269.

In concluding that the ownership, control and operation of Port facilities are essential and usual prerogatives of sovereignty, especially of the sovereignty of the constituent state governments of the United States, the Circuit Court of Appeals in Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, said:

"Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people. * * * Historically, port activities have been shown to be almost universally, directly subject to the supervision of agencies of government."

Public governmental wharves or piers existed not only in the early days in England but also in the American Colonies. The history of New York is but typical. Thus, in 1676, we find the City of New York imposed a tax for the construction of new docks. In 1686 the New York Colonial Legislature authorized both New York and Albany to construct and repair water-courses, streets and highways. In 1691 the Mayor, Aldermen and Council of New York were given the power to appoint supervisors of wharfs, docks, streets and lanes. Again, in 1734 the Colonial Legislature directed the construction of a public wharf in Albany. Such governmental port projects are referred to in the argument of counsel in Gibbons v. Ogden, 9 Wheat. 1, 73, 74 (1824):

"The right of a state to regulate its internal trade, applies as well to its navigable waters as to its other territory. * * * It grants the land under water at pleas-

¹ Minutes of the Common Council, Vol. I, p. 10.

² Colonial Laws of New York, 1686, I, pp. 183, 198.

³ Chapter 18, Colonial Laws of New York, 1691.

⁴ Chapter 620, Colonial Laws of New York, 1734.

ure, builds public piers, erects dams and other obstructions, and diverts the course of the waters for any purpose whatsoever." (Italics ours.)

In 1877 the New York Court of Appeals reviewed the governmental operation of the Port's facilities and forcefully urged upon the State its governmental duty to go forward with the development and future planning of the Port of New York. In Williams v. The Mayor, 105 N. Y. 419, 436, the Court said:

"The State owned but a single seaport open to commerce and touched by tide water, and that one a harbor of remarkable size and convenience. Its interest to concentrate there ships and cargoes from all parts of the world, by protecting the harbor and lining it with docks and piers, was very great, and took on the character of a duty due to the prosperity of the commonwealth. It early imposed that duty upon the city and the citizens by whom it has been steadily performed, at very great cost, and one in the future to be largely increased. Every grant the State made was in aid of the expenditure involved in the performance by the city of that duty, and in consideration of that performance. Little enough of its own duty has been borne by the State, and to call that little a pure gratuity amounts almost to a sarcasm." (Italics ours.)

In Matter of Mayor of the City of New York, 135 N. Y. 253, 262, 263, the Court of Appeals again urged the development of the Port of New York as a public duty owing by the State. It is interesting to note in passing that this case, decided in 1892, reviews the efforts made by the State up to that time in the development of the Port, and refers to the port reforms of 1871, as follows:

"The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders. That duty, * * * it early imposed upon the city and the citizens, by whom it has steadily

been performed at great cost. In 1871 the legislature changed entirely the general system by which this duty of building bulkheads, docks and piers had theretofore

been performed.

"Instead of devolving upon private owners the duty of building such structures and giving to private individuals the right to collect wharfage, a general and vast system was provided for by the act of 1871 (Chap. 574). That system involved the adoption of a plan for the building of bulkheads and piers by the city itself along the whole water front washed by the two rivers, and the collection of wharfage by the city as compensation for their use."

The people of States were to wait fifty years before the accomplishment of the next great port reform—the creation, in 1921, of The Port of New York Authority.

The governmental duty of the states in the development of their ports and harbors was stressed also by the Supreme Court of California in *Board of Port Commissioners of the City of Oakland* v. Williams, 94 Cal. Dec. 195, 200 (1937):

"* * it is the paramount duty of government to zealously guard the public interest, unhampered by private contracts which may hinder its control of or impair the full beneficial use of its harbor, ports, waterways and tidelands which are held in trust for the promotion and improvement of navigation and commerce."

Finally, the governmental nature of such waterway development by the states, as an established national policy, is attested by the declaration of Congress (33 U. S. C. A. § 551; 40 Stat. 1286) that,

"It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms." (Italics ours.)

This general declaration of policy, is in complete accord with Congressional reference to the Comprehensive Plan for the development of the Port of New York, that

"* * * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military and other 'services of value to the Nation," (Pub. Res. No. 66-67th Cong.)¹

The Legislatures of the two States have declared that the activities of the Port Authority

"are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof * * *" (Chap. 4, Laws of New Jersey, 1931, Sec. 14; Chap. 47, Laws of New York, 1931, Sec. 14:) [Italics ours].

The brief submitted here by the American Association of Port Authorities, amicus curiae, contains a survey of governmental activity in port development throughout the world, and shows that the nature of port development is such that it can be accomplished only through such action.

2. BRIDGES, TUNNELS AND HIGHWAYS.

It is a settled principle of law as well as an obvious statement of fact, that public bridges are a part of the highway

Of the foregoing congressional declaration of the Supreme Court of New York in Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144, 151, has said:

[&]quot;This indicates clearly that Congress regarded the solution of the port problem as an exercise by the States of an essential function of government."

which passes over them. "At common law a bridge was a common highway." Washer v. Bullitt Co., 110 U. S. 559, 564; County Commissioners v. Chandler, 96 U. S. 205, 208; Pain. v. Patrick, 3 Mod. 289, 294 (1690); Woolrych, "A Treatise on the Law of Ways" (1834 Ed.), pp. 5, 195.1 Historically, they have always been treated as such.2 And, of course, tunnels are merely the more modern way of "bridging" waters to afford a passage for public highways. Accordingly, all of the Port Authority's interstate crossings are treated by the two States as a part of their highway systems, and they have been found to be such by the Courts of each State.3 In every case which has passed upon the immunity of State bridges from Federal taxation, they have also been treated as highway connections. See Commissioner v. Harlan, 80 F. (2d) 660, 661; United States v. King County, 281 Fed. 686, 688; Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920, 923; Boomer v. Glenn, 21 F. Supp. 766, 767. For the purpose of this discussion, we shall therefore treat bridge, tunnel and highway construction as a single subject.

Turning to the history of the governmental development of bridges and highways, we find, in the recent language of a Federal Court, that

"The construction and maintenance of highways and bridges as a governmental function is one of the most

¹ See also 9 Corpus Juris 422, footnote 12, and cases there cited.

² See Public Works in Mediaeval Law—Edited by F. T. Fowler, for the Seldon Society, 1923 Introduction, page xxv.

³ Chapter 50, Laws of New Jersey, 1918; Chapter 352, Laws of New Jersey, 1920; Section 1, Chapter 47, Laws of New York, 1931; Section 1, Chapter 4, Laws of New Jersey, 1931; Chapter 599, Laws of New York, 1932; Chapter 113, Laws of New Jersey, 1932; Clarke v. Ackerman, 154 N. Y. Misc. 267, 243 App. Div. 446; New Jersey Interstate Bridge and Tunnel Commission v. Jersey City, 93 N. J. Eq. 550, 551, 553; State Highway Commission v. Elizabeth, 102 N. J. Eq. 221, 229.

ancient known to the law, having had its beginning prior to the civil or common law." Boomer v. Glenn, 21 F. Supp. 766, 767.

Herodotus points out that as early as 4000 B. C. the Pharaoh Menes, the founder of the First Dynasty, had a bridge constructed over a branch of the Nile. And there is evidence of a tunnel constructed over four thousand years ago, about 2180 B. C., under the Euphrates River. This tunnel has been attributed to Queen Semiramis of Assyria. but we have no convincing proof of its construction as a governmental project.

However, when we turn to the Greeks and the Romans, the record is clear. The Kings of Sparta were especially charged to see to the good condition of the roads. The place of the Romans as the great bridge and highway builders of antiquity is almost too well known to require comment. As is pointed out in Boomer v. Glenn, supra, at 767, "The Romans celebrated every victory by building a highway or bridge." And the character of bridge building as a function of government among the Romans is nicely illustrated in the title "Pontifex Maximus" borne by high governmental officials throughout the history of the Republic and attached by the Emperors to their imperial dignity. The function of that

[&]quot;"Bridges—Old and New"—Franklin Institute Journal, Volume 194, pages 291, 292 (1922).

^{2&}quot;The Story of Tunnels," by Archibald Black, page 4.

³ Nicholas Bergier, 'Histoire des Grands Chemins de L'Empire Romain' (1728), Chapitre 11, Book I, page 3, "De La Dignité de ceux que ont esté commes aux ouvrage des Grand Chemins."

⁴ Jacob Leupold, Theatrum Pontificiale (1726), pages 1, 2 (available, Library Engineering Society, New York City).

For an enumeration of public bridges built by the Republic and the Emperors of Rome, see "Bridges—Old and New" by Ralph Modjeski, Franklin Institute Journal, Volume 194, page 291 (1922).

office, before it had acquired its exclusive religious significance, is manifested in that title itself—Principal Bridge Builder.¹

In the common law of England, the recognition of bridges and highways as peculiarly within the concern and responsibility of the government, appears clearly from all authorities. In *Butter* v. *Perry*, 240 U. S. 328, 330, this Court itself reviewed the early English law, as reported by Blackstone. Mr. Justice McReynolds said:

"In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus declared in Blackstone's Commentaries, bk. 1, page 357:

Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the trinoda necessitas, to which every man's estate was subject; viz, expeditio contra hostem, arcium constructio, et pontium reparatio. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted.'

[&]quot;'The supervision of roads and bridges was held so honorable a duty among the Romans that their highest religious official was styled 'Pontifex Maximus' (i.e. 'head bridge builder'), whence the title of 'Pontiff,' still worn by the Pope.' State v. Covington, 125 N. C. 641, 644, 34 S. E. 272.

The trinoda necessitas was an obligation falling on all freemen, or at least on all free householders. Vinograd-off, English Society in the Eleventh Century, p. 82."

The construction of bridges as one of the three great services for which every man might be conscripted, and to which his estate was subject, is emphasized also by Holdsworth, "History of English Law", Volume 1, p. 19:

"It is true that in these grants of governmental rights certain duties like military service and the repair of bridges and fortresses, which are usually compendiously described by the phrase *trinoda necessitas*, were always implicitly and sometimes expressly reserved."

The story of each one of the famous English bridges over the Thames, from the bridge built by Peter Colechurch around 1200, reveals a continuous practice of governmental construction, financing and maintenance.²

Turning to our own country, we avail ourselves of the language of McQuillan, Municipal Corporations 2nd Ed. (1928) Volume 1, Section 246, page 631:

"During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country the control of highways is primarily a state duty."

The construction and operation of the Cumberland Road by the Federal Government, conceived by Washington

¹ See also Public Works in Mediaeval Law—Edited by F. T. Fowler for the Selden Society, Introduction, pages xxv and xxvi.

² Gephyralogia—An Historical Account of Bridges—Antient and Modern (1751); The Development of Bridge Construction, by Philip G. Laurson, Volume 21, Journal of Engineering Education, pages 433, 438 (1931).

in 1780 and financed by Congress in 1802, and the eventual turning over of this facility by the Federal Government to the States for operation as a toll road, illustrates the traditional governmental importance of highways in this country, both to the Federal Government and to the States. See Searight v. Stokes, 3 How. 151, 163-166; Indiana v. United States, 148 U. S. 148.

The high governmental character of the construction and maintenance of highways by the states was pointed out by this Court, after reviewing the common law authorities as quoted above, in *Butler v. Perry*, 240 U. S. 328, 331. Turning to the situation in America, this Court said:

"From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor. (Citing authorities) In 1889 the statutes of twenty-seven states provided for such labor on public roads."

The complete adoption by the American states of the common law duties and responsibilities of bridge and highway construction and repair is evident from the decision of the New Jersey Supreme Court in *Freeholders of Sussex* v. Strader, 18 N. J. L. 108, 111, in the following language:

"The repair of bridges (reparatio pontium, anciently a part of the trinoda necessitas,) is one of the most important of those objects, not only at common law, but as recognized by our statutes. 1 Black, C. 376; 2 Wm. Black, 685; 2 East, 342, 356; 2 Maul, and S. 513; Ryan. & M. 144; 1 Barn and A. 289; 13 Rep. 33; N. J. Rev. L. 285. It has ever been held in England, that the statute of 22 Henry 8th ch. 5, which places the burthen of

repairing bridges, (except in special cases,) upon the county, was merely declaratory of the common law. 13. Co. 37, sec. 7; 2 Inst. 701."

In New York the construction of roads was performed by state or municipal agencies from the inception of organized government. Thus, in the records of a Long Island town, we find this entry with respect to highway supervision, under date of March 14, 1659:

"It is ordered that John Smith nants Rich'd Willets Ambros Sutton and John Smith Junior shalbe Surveyors of the High wayes for this present yeare, And shall perform ye duty of surveyors and that any person that shall refuse to come to doe ye Labour belonging to them shall pay for A man 4s, and for a man & his teeme 8s, And ye surveyors by default of performing their duty shall pay for each default 40s ster." Records of the Towns of North and South Hempstead, Long Island, New York, I, 74.

The very first session of the New York Colonial Assembly provided for the selection of highway supervisors.² Numerous special highway authorizations in the Colonial Assembly followed.³ The Road District as a governmental unit existed

¹ See also State v. Covington, 125 N. C. 641, 644, 34 S. E. 272; State v. Holloman, 139 N. C. 642, 647; 52 S. E. 408.

² Colonial Laws, 1691, Chap. 3, p. 226.

³ In 1739 Suffolk county was permitted to elect town highway commissioners (ibid., c. 686). Kings, Queens, Richmond, and Oswego counties were empowered by an act of 1745 to elect three freeholders in each town to lay out highways (ibid., c. 805). In 1756 town commissioners were named by the council and general assembly in Ulster county (ibid., c. 1001). Two precincts in Orange county were authorized to elect three surveyors of highways and to levy a three shillings tax in 1760 (ibid., c. 1144), and Richmond county was authorized to select two freeholders in each precinct to be highway overseers (ibid., 1764, c. 1267).

in New York as early as 1797 (Chap. 43, Laws of New York, 1797). In 1790 contracts were let for the building of a road between the Susquehanna and Hudson Rivers (Chap. 53, Laws of New York, 1790). Two years later, the State was divided into four highway districts, and \$20,000 was placed at their disposal for the opening of highways and the construction of bridges (Chap. 60, Laws of New York, 1792). In 1788, the same year in which New York ratified the Federal Constitution, the New York State Legislature authorized and empowered each town in the State to choose three highway commissioners to supervise the local highways (Chap. 64, Laws of New York, 1788). These highway activities of the State during the first years of the republic. suggest the very recent language of this Court (Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537, 540), that the governmental duties which the Court holds immune include "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

The Federal Courts have always regarded the highway systems of this country as not only a usual and customary sphere of state activity, but as one of the most essential of their governmental duties. This Court said in *Atkin* v. *Kansas*, 191 U. S. 207, 221, 222:

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for, it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with the power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character." (Italics ours.)

And most recently in South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469, 474, the Court said:

"Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. * * * local highways are built, owned and maintained by the state or its municipal subdivisions."

Facing the force of the historical argument, the Commissioner (Brief, p. 40) attempts to escape it by reference to examples of the private operation of bridges. We know of no private analogue for the development of American ports and highways. It is quite true, of course, that there are a few bridges operated by private interests, but it is clear that in this country they are few and far between. There has never been a private development of a vast network of interstate crossings, with connecting arterial highways, linking the road systems of two states, as a part of a comprehensive plan of port development. Furthermore, we know of no governmental function, from the operation of the post office to the maintenance of schools and the raising of armies, that has not been, or is not today, the subject, to some extent, of private operation (See Brush v. Commissioner, 300 U. S. 352). Unlike the supply of water, the development of ports and highways has never been "left largely, or even entirely, to private enterprise". Their governmental operation has not "had a recent beginning" (Brush v. Commissioner, 300 U. S. 352, 371). They have always been functions of government.

The organization of commissions, districts, authorities and other types of state agencies for the construction and maintenance of bridges and tunnels for operation of these facilities on a self-liquidating basis has been recognized as a function of government by the highest courts of many of the States. In re California Toll Bridge Authority, 212 Cal. 298; 298 Pac. 485; California Toll Bridge Authority v. Kelly, 218 Cal. 7; 21 Pac. (2d) 425; Bates v. State Bridge Commission, 109 W. Va. 186; 153 S. E. 305; Alabama State Bridge Commission v. Smith, 217 Ala. 311; 116 So. 695; Estes v. State Highway Commission, 235 Ky. 86; 29 S. W. (2d) 583; Bloxton v. State Highway Commission, 225 Ky. 324; Tranter v. Allegheny County Authority, 316 Pa. 65; 173 Atl. 289; Buffalo and Fort Erie Public Bridge Authority v. Davis, N. Y. Ct. of Appeals, decided March 8, 1938.

The fact that a toll is charged for the use of a bridge or tunnel does not affect its character as a public highway. County Commissioners v. Chandler, 96 U. S. 205, 208; Brush v. Commissioner, 300 U. S. 352, 372.

Modern economic and social conditions require the furnishing of public highways, now more than ever before. When we turn to the practical consideration of whether or not the construction of highways is a usual governmental function, we find it to be the activity to which state governments have in recent years actually devoted the largest share of their revenues. The reports of the United States Department of Commerce, Bureau of Census, entitled "Financial Statistics of States" for the years 1929, 1930 and 1931 (the last years for which complete figures are available), indicate that the largest items of state expenditures for capital outlay and maintenance were as follows:

1929

Total Expenditures \$	1.992,705,957
Highways	752,171,713
Education	559,737,280
Charities, Hospitals and Correction	260,634,569
General Government	126,709,168

1930

Total Expenditures	
Total Expenditures	\$2,178,279,827
	886,514,579
EddCation	598,058,080
Charlies, Hospitals and Correction	276,896,277
General Government	124,866,796
. 1931	,
Total Expenditures	\$2,389,125,642
21 cyrology	000 000 000
Education	690 697 970
Charities, Hospitals and Correction	629,687,870
General Government	
deneral devernment	147 595 197

We therefore conclude, after consideration of the three lines of inquiry suggested in these Points II, III and IV, that even were there no controlling precedents on the immunity of the Port Authority from taxation, immunity would nevertheless be evident from the foregoing pragmatic inquiry into the Port Authority and the nature of its functions. Those three questions—the public necessity, the governmental character of the agency, and the extent of governmental exercise of the function—are suggested by analysis of the method used by this Court in its most recent decisions in this field. Applied to the present cases, they leave no other conclusion than that The Port of New York Authority is a governmental instrumentality of the States of New York and New Jersey, exercising essential, usual, and traditional governmental functions.

POINT V.

The Port Authority is the agency of the States alone.

We have shown (supra, Point III) the close governmental interrelation between the two States and their instrumentality, the Port Authority. This close interrelation has been pointed out in the brief submitted by the Attorneys General of New York and New Jersey and other states. Despite all these evidences of integration and control, the Commissioner contends (Brief, Point II) that, Congressional consent to the Compact destroys the character of the Port Authority as the governmental instrumentality of the States, and transmutes what were theretofore state functions into taxable federal functions: In this startling view the Port Authority "exists subject to the caprice of the Federal Government" (Commissioner's Brief, Circuit Court, p. 44), and the entire compact has the status of an Act of Congress! (Brief, p. 53).

The theory upon which the Commissioner offers this contention (and also his contention discussed hereinafter in Point VI) was considered and rejected by the Second and Ninth Circuits in Commissioner v. Ten Eyck, 76 F. (2d) 515 and Commissioner v. Harlan, 80 F. (2d) 660, 662.

Their answer to the contention, as well as that of the Courts below, is best expressed in the opinion of the Board of Tax Appeals in the following language (R. f. 75):

"* * there is no reason to regard the revenue act as a means used by Congress * * * as an implied condition of its consent to the interstate compact. * * * It would mean that in making an interstate compact the states would be surrendering the very sovereignty which the Constitution takes for granted and upon which the compact is founded—and this, not directly by an express

condition in the resolution of consent, but by an implied relation between the general terms of the consent and the broad terms of the revenue act. Is it to be supposed that in the blanket consent to interstate compacts for crime prevention * * * lurks a power to tax the state police officers who are employed under the compact?"

Indeed, the New York Supreme Court has interpreted the Congressional consent to the Port Compact as a recognition by Congress of the development of the Port, as a function of state government. Bush Terminal Co. v. City of New York, 152 N. Y. Misc. 144, 151.

The Commissioner refers, in support of his theory, to the memorandum recently filed by the Attorney General of the United States in *Hinderlider* v. La Plata River and Cherry Creek Ditch Company, No. 437, Present Term, and again cites the cases relied on in that memorandum. The Port Authority joined with several States in the submission of a memorandum (dated January 17, 1938) controverting the soundness of the Attorney General's memorandum. Upon the submission of the latter memorandum the Attorney General elected not to press the position previously taken by him.¹ He has submitted no answer to the arguments made in the States' memorandum.

No useful purpose would be served by restating the arguments offered in that memorandum of the Port Authority and the States submitted in the *Hinderlider* case. We respectfully refer the Court to pages 11 to 30 thereof. We believe that memorandum establishes that a compact is an exercise of the legislative powers of the states and not an

¹ See Attorney General's memorandum in that case dated February, 1938.

act of Congress (People v. Central Railroad Company, 79 U. S. 455; Hamburg American Steamship Co. v. Grube, 196 U. S. 407), and that the requirement of Congressional consent, far from being a grant of power to the contracting states, is rather a protection of the other states of the Union against destructive political combination. It has but the effect of removing a political barrier to the exercise of sovereign powers inherent in the states. Once that barrier is removed, the action taken is the sovereign enactment of the states themselves. Rhode Island v. Massachusetts, 12 Pet. 657, 725; Poole v. Fleeger, 11 Pet. 186, 209; Virginia v. Tennessee, 148 U. S. 503, 525; Marlatt v. Silk, 11 Pet. 1, 22.

The States' memorandum showed, too, that the consent of Congress is not necessary to the validity of every compact. Virginia v. Tennessee, supra; Louisiana v. Texas, 176 U. S. 1, 17; 2 Story, Commentaries on the Constitution (5th Ed. 1891), Sections 1402, 1403. Even if this contention of the Commissioner had any legal merit it would therefore be seriously undermined by the grave doubt whether the Port Compact of 1921 actually required congressional consent.

Moreover, the Compact and all of its supplemental legislation were based upon the conception that the States were to perform the task. The Federal Government was not asked to do anything pursuant to the Compact and the Comprehensive Plan.

The Commissioner summarizes his argument in the following language (Brief, p. 56):

"Their compensation is derived from a corporation created by the joint legislation not only of the States of New York and New Jersey but also of the Congress of the United States. * * * Accordingly, the Port Authority cannot assert an independence of Congress,

which participated in its creation, and cannot claim a constitutional immunity from taxes imposed by Congress."

Has the Commissioner forgotten that the Panama Rail Road Company, held immune by this Court, was created solely by the State of New York? That Congress did not even participate in its creation? Does he not realize that as a New York corporation it must conform to numerous regulations imposed by the Laws of New York? That it has no independence of the State which created it? Yet, this Court has held that Company immune from State taxation in its present corporate form. Obviously, the Commissioner must abandon his argument on this point or deny the authority of the Rogers case. That case shows that the test of immunity does not measure the quantum of State or Federal participation in an agency's creations. If the agency, State or Federal, is engaged in the performance of governmental functions, it is immune.

The Commissioner's whole line of argument in Points II and III of his brief rests upon fundamental error in constitutional law. It ignores the dominant characteristic of American government, the very characteristic which necessarily gave rise to the immunity rule—the dual and limited sovereignty of both state and federal governments. The American form of government knows no such absolute sovereignty as the Commissioner would seem to hypothesize for his argument.

Clear thinking will recognize that these very limitations upon the sovereignty of our state and national governments gave rise to the doctrines established in McCulloch v. Maryland and Collector v. Day. The rule came into being for

the very reason that this Court was always dealing with limited sovereignties. From the days of Marshall it has carried the responsibility of making "adequate provision for preventing conflict between them." Helvering v. Therrell, 82 Law. Ed. Adv. Ops. 537, 540.

POINT VI.

Federal regulation of interstate commerce does not impair the immunity of the Port Authority.

Like the contention as to the effect of Congressional consent to a compact, the contention that Federal regulation of interstate commerce destroys the immunity of the Port Authority rests upon a series of fundamental errors. Running through all of these errors, however, is the basic misconception which presupposes that absolute sovereignty and freedom from regulation are indispensable to the application of the Constitutional immunity doctrine. The Commissioner fails to recognize that we are dealing with a nation of limited rather than absolute sovereignties.

Aside from its rejection by the lower Courts here, it is a contention that has been raised and disposed of in both the Second and Ninth Circuits—Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, 518 and Commissioner v. Harlan, 80 F. (2d) 660, 662. In the Harlan case the same legal theory was argued by the Commissioner. The Court replied:

"The petitioner further contends that * * * the state in the construction of the bridge was not acting in its sovereign capacity, because state control must be exclusive and supreme in order to afford a basis for the doctrine of immunity. The cases cited by petitioner do not support his contention, nor is the position correct. The fact that the state may be limited by the federal government in carrying out its essential governmental functions does not change the nature of those functions."

The Board of Tax Appeals below replied to the contention as follows (R. f. 74-75):

"The argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation * * *. The argument is not new. It was considered and rejected in Commissioner v. Harlan, supra, and there is enough in the opinion and briefs in the Ten Eyck case to show that the Federal power over interstate commerce and navigation were not overlooked. But to deal with the issue squarely, we are of the opinion that the development of the port may not be interfered with by Federal tax even though the interstate and foreign commerce passing through the port and upon its highways, bridges, and tunnels is subject to Federal regulation, even though the navigable waters under its bridges and over its tunnels are under Federal control, * * *. To this may be added that there is no reason to regard the revenue act as a means used by Congress to regulate interstate commerce, to control navigation, * * *. Such a view, if accepted, might go so far, for example, as to subject the employees of a state highway department or public service commission to Federal tax under the present law."

The Commissioner's analogy between the Federal power to regulate, on the one hand, and the constitutional immunity of State instrumentalities from Federal taxation, on the other, was flatly rejected by this Court in *United States* v. California, 297 U. S. 175, 184, 185:

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce." (Italics ours.)

In other words, the Federal government obviously has the power to regulate many State functions that are nevertheless immune from Federal taxation. It may regulate the state highways. South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469. It may regulate a state contract fixing intrastate railroad rates. New York v. United States, 257 U. S. 591. It may regulate State sanitary districts. Sanitary District v. United States, 266 U. S. 405. It may regulate activities of State educational institutions. University of Illinois v. United States, 289 U. S. 48. It may set aside the order of state public service commissions. New York v. United States, 257 U. S. 591.

If there is any merit in the Commissioner's contention, he must necessarily take the position that all of these state functions are taxable. Yet, although Sanitary District of Chicago v. United States, 266 U. S. 405 holds that the United States in the regulation of commerce may prevent the withdrawal of a water supply by a state, Brush v. Commissioner, 300 U. S. 352, holds that a state in securing its water supply is immune from taxation! South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469, says that the Federal government may regulate state highway operations, but Brush v. Commissioner, supra, at page 373, says that the operation of its highways by a state is immune from taxation!

Finally, United States v. California, 297 U. S. 175 holds that the Federal government may regulate the activities of

the California Board of State Harbor Commissioners, but the Commissioner himself says that the activities of that Board are immune from taxation!

In all of the foregoing cases, the Commissioner could conclude, as he concludes here in his brief (Brief, p. 64) that the Federal Government was "possessed of these sweeping powers". To his suggestion that the immunity of the Port Authority is "anomalous", we reply that the real anomaly is in his attempt to reconcile these immunity decisions with his theory of the effect of Federal supremacy in the field of interstate commerce.

From the foregoing decisions the fallacy of the Commissioner's contention is demonstrated. We need only point out in conclusion that the very premises upon which the contention was based were taken in error. Thus, the entire argument is based upon the assumption, (Commissioner's Brief, p. 61) that the Port Authority is engaged in, and that its bridges and tunnels are instruments of interstate commerce. On the contrary, this Court has held that the operation of interstate bridges does not constitute interstate commerce and that the capital represented by an interstate bridge is not used in interstate commerce. Detroit International Bridge Company v. Corporation Tax Appeal Board, 294 U. S. 83 (1935). In that case this Court in holding that ownership and operation of a bridge between Michigan and Canada was not engaging in foreign commerce, said (p. 86):

"The argument for reversal is, of course, ineffective if ownership and operation of the bridge do not constitute foreign commerce."

¹Letter addressed to Secretary of California Board of State Harbor Commissioners by the Bureau of Internal Revenue, dated August 6, 1937.

"After much consideration, and notwithstanding emphatic consent, Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 S. Ct. 532, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. * * *

"We find no adequate reason for departing from the view so expressed." (Italics ours.)

Before leaving this point it should be noted that the states have exclusive and sovereign jurisdiction of navigable waters. and interstate commerce within their territorial limits, where the Federal government has not pre-empted the field. The sovereign character of this power of the states is indicated by the fact that this Court has referred to it as "plenary" and as "full power", and as "peculiarly within its (the state's) competence, even though interstate commerce is materially affected" South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469, 474; Huse v. Glover, 119 U. S. 543, 548; Cummings v. Chicago, 188 U. S. 410. "How the highways of a state, whether by land or by water shall be best improved for the public good is a matter for state determination." Huse v. Giover, supra, at 549. See also Escanaba Trans. Co. v. Chicago, 107 U. S. 678, 683. The cases on this point are completely noted by Mr. Justice Stone in South Carolina State Highway Department v. Barnwell Bros., 82 Law. Ed. Adv. Ops. 469, 475, 476. And as to port terminal development, Congress itself has declared, as a matter of national policy, that it is essentially a state function (33 U. S. C. A. §551).

We recognize, of course, that the power of the Federal government in interstate commerce is paramount. But state activities in that field are none the less sovereign if under-

taken in the exercise of governmental duties. That the Federal government may limit the exercise of those functions does not change their nature as essential governmental functions. See *Commissioner v. Harlan*, 80 F. (2d) 660, 663.

But, we repeat, the Commissioner's error lies fundamentally in mistaking the *nature* of sovereignty in a dual system of government such as ours. The very division of power, the yielding of some functions by one government to the other and the reservation of others, is entirely inconsistent with any concept of absolute sovereignty in either the Federal government or the States.

POINT VII.

Taxation of the Port Authority would be a direct burden on the two States. Its functions do not constitute a withdrawal of any normal sources of Federal revenue.

The Commissioner argues that the States would not be burdened by a tax upon the Port Authority. The decisions of this Court teach that any tax on an instrumentality of government must be treated as a burden on the government itself. However, the facts here demonstrate that the tax which the Commissioner seeks to impose would directly burden the States themselves. Those burdens are detailed in the Brief submitted as Amici Curiae by New York, New Jersey, and other States (See Point IV of that Brief). It is there pointed out that the burden of Federal taxation would necessitate an abandonment of the whole Authority plan. Moreover, the Commissioner's theory would disrupt any plan of port, bridge and highway development by the States—for the Commissioner's argument goes to the functions them-

selves, as well as to their exercise through municipal instrumentalities. The revenues of the Port Authority belong to New York and New Jersey and can be disposed of only in accordance with their statutory directions. The States' appropriations of \$3,000,000. for the support of the Port Authority, their advances of over \$18,000,000., their direction for the pooling of the revenues of all of their interstate crossings,—all establish the burden that would be placed upon their State Treasuries. Furthermore, the States' Brief shows that a Federal tax, necessarily increasing the operating expenses of the Port Authority, will indefinitely postpone the return of the States' investment in port projects, and may impose upon them the duty of resuming annual payments of \$100,000. each in support of the port program.

The Commissioner urges that the "competition" of the Port Authority's bridges and tunnels with private ferries, decreases the revenues of those ferries, and so interferes with that source of Federal revenue (Brief, pp. 45, 46). But competition does not alter the character of any activity otherwise governmental. Both the Panama Rail Road Company and the New York Department of Water Supply were necessarily in competition with private agencies and were nevertheless held immune by this Court.

The reply of the Board below brings out the entire fallacy of the "competition" argument. The Board said (R. f. 75-76):

"This is said * * * of the destruction of private ferry competition. If these were independent profit-making ends in themselves, the argument would be more engaging. But these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of im-

proving the port * * *. The bridge and tunnel tolls and the reduction of traffic on the private ferries were incidental to the governmental project of providing highways to facilitate traffic and reduce port and harbor congestion in the common public interest. It has not heretofore been suggested that the maintenance of a free state highway was a proprietary function subject to Federal tax because it diminished or destroyed the traffic on an existing private toll road. State public school teachers are not regarded as taxable because a new public school may réduce the taxable profits of an existing private school."

The Board's opinion brings out the point perfectly. The very purpose of the two States in directing the Port Authority to construct bridges and highways across the Hudson and the Staten Island Kills, was to eliminate the economic waste and inefficiency of an antiquated ferry system. The activities simply are not comparable. This is competition only in the sense that a highway competes with a railroad. It is competition only in the sense that Rock Creek Park competes with a private amusement park, that a public library competes with a private lending library. The competition of the Post Office Department, recognized as immune in the Brush case, has been so keen that it has practically put the older express companies out of business. Postal savings compete directly with private banks.

The Commissioner suggests (Brief, p. 43) that the activities of the Port Authority effect a withdrawal of sources of revenue from the Federal taxing power. In attempting to prove such a withdrawal he simply points to the fact that the Port Authority has large operating revenues, and ingenuously concludes that a tax would therefore be productive (Brief, p. 45). But the productiveness of a potential

tax source is hardly a test of its governmental immunity. The Commissioner simply begs the question.

If it is the amount of gross revenues which makes the projects subject to taxation, we call the Court's attention to the fact that the gross revenues of the Postal Service for the fiscal year 1937 is \$726,201,109.89, and that the compensation to postmasters alone is \$48,517,995.20.\(^1\) The revenues from tolls through the Panama Canal amounted to \$24,163,569.42. The revenues from the Panama Rail Road alone totalled \$14,553,291.11\(^2\). Are they therefore subject to state taxation?

The Port Authority does not withdraw sources of revenue from the Federal taxing power. This is clear from the entire history leading up to the creation of the Port Authority (supra, pp. 7-17). In contrast with other instrumentalities which have appeared before this Court, such as the Panama Rail Road Company and the New York Department of Water Supply, the Port Authority takes the place of no former taxpayer. It is carrying on a work which could not conceivably be carried on by private enterprise. Its bridges and tunnels were the first ever to span the interstate waters of the Port. The Inland Terminal system is a revolutionary development in the handling of the Port District's freight, the release of its waterfront, and the amelioration of metropolitan traffic congestion.

The execution of the Comprehensive Plan involves an investment to date of a quarter of a billion dollars—all with no prospect or possibility of return to the States, except in the health and welfare of its citizens. Indeed, much of the

¹ Report of Postmaster General, Fiscal year 1937, page 95.

² Annual Report of Secretary of War, 1937, page 19.

work of the Port Authority is carried on without revenues of any sort. The studies, investigations and activities connected with harbor improvements, channels, docks, pier storage, consolidation of lighterage, free ports, and the like, all involve no income of any sort and are connected with no revenue whatsoever. It is absurd even to contend that private individuals could be found, public spirited enough to pour in the necessary hundreds of millions of dollars merely to develop the Port of New York, without benefit to themselves and entirely in the interests of the welfare of the ten million people of the Port District. The States alone could do it. The vital aid which the States have given in the form. of appropriations, advances and tax exemptions, would have been impossible to a private enterprise. Any realistic approach shows that private development, along the lines of the Comprehensive Plan, was utterly impossible.

In commenting on this argument of the withdrawal of sources of Federal revenue, the Circuit Court of Appeals (Commissioner v. Ten Eyck, 76 F. (2d) 515, 519) said:

"The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not withdrawing sources of revenue from the Federal taxing power. It has supplanted no private business to which the Federal taxing power would normally extend." (Italics ours.)

We may also observe that this theory, that "competition" decreases Federal revenues from ferry companies, gives no consideration whatever to the fact that since the Holland Tunnel was opened in 1927 trans-Hudson traffic has increased from 16,000,000 to 30,000,000 vehicles a year, and

that consequently the Port Authority facilities have largely created their own traffic. (See R. f. 413.) It gives no consideration to the fact that the entire purpose of the two States in developing the Port of New York is to increase and to facilitate its commerce, and to make those necessary contributions to the welfare of its people as would necessarily tend to forward their general prosperity. It takes no account of the fact that the millions of dollars which have been saved, and will be saved, to the nation's shippers and to the consuming public by the work of the Port Authority, directly increases the sources, quantity and stability of Federal revenues.¹

There can be no mistake as to the real objective of the Commissioner in these cases. It is his definite purpose to challenge the immunity of the bonds of the Port Authority, if he is successful here (R. f. 311). Indeed, the Commissioner's Brief openly declares his purpose to tax the Port Authority's revenues (pp. 45, 47, 56).

The real aim here is to open up a wide source of new revenue to the Federal Government—regardless of its effect on the States and regardless of its ultimate effect on the Federal Government itself. In attempting to do so by a reversal of a wide field of established precedent and constitutional principle in this Court, we respectfully submit that the Commissioner mistakes his forum. He would have better standing in following orderly constitutional processes.

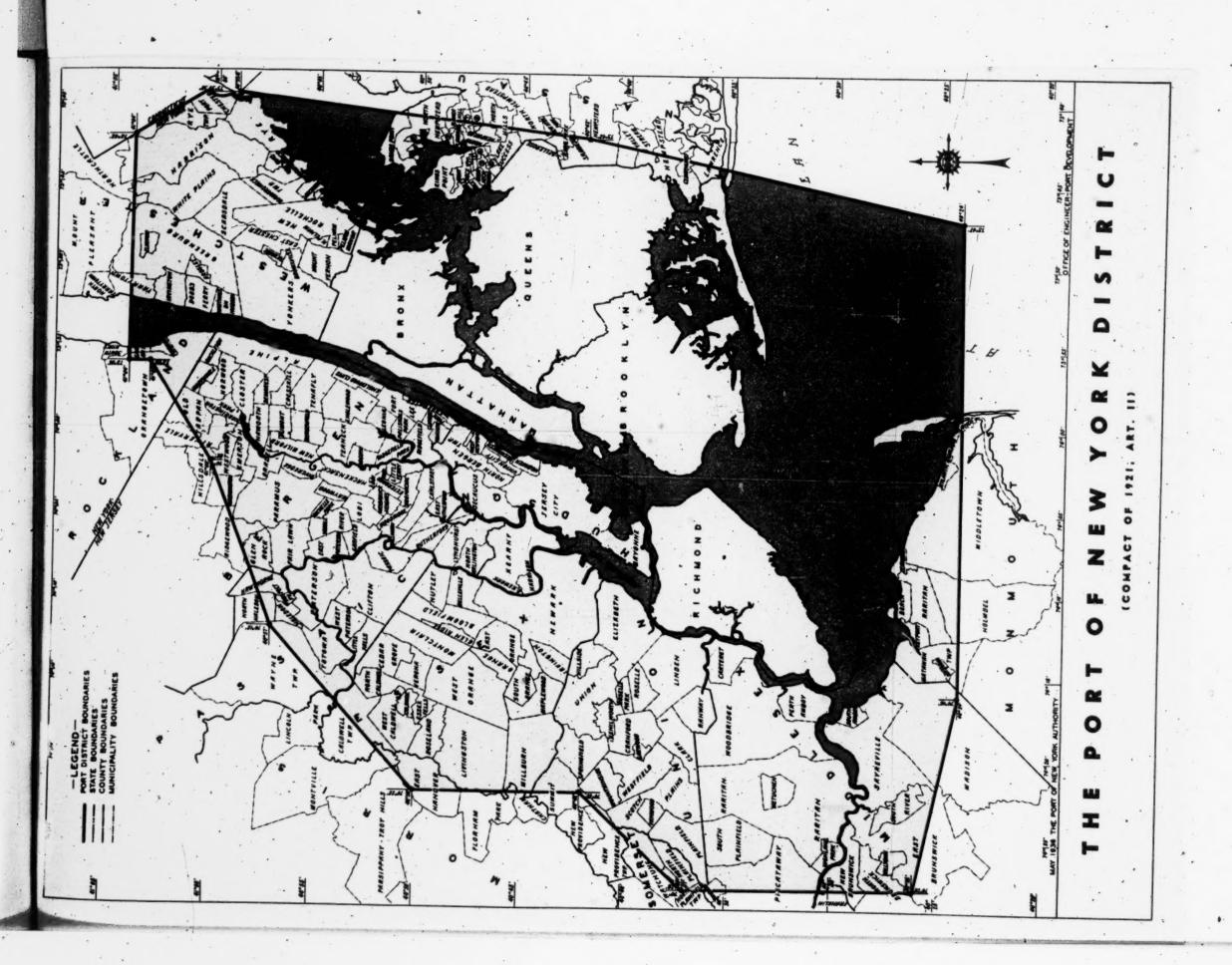
¹ The Commissioner mistakes the purpose of this observation (Brief, p. 46). We do not advance it as a reason for immunity. It is only suggested in passing, and in conjunction with our direct replies noted above in the text, as a factual denial of the Commissioner's contention that the activities of the Port Authority withdraw Federal revenue sources by reducing the earnings of ferry companies.

Wherefore, we respectfully submit that the decision of the Circuit Court of Appeals should be in all respects affirmed.

Respectfully submitted,

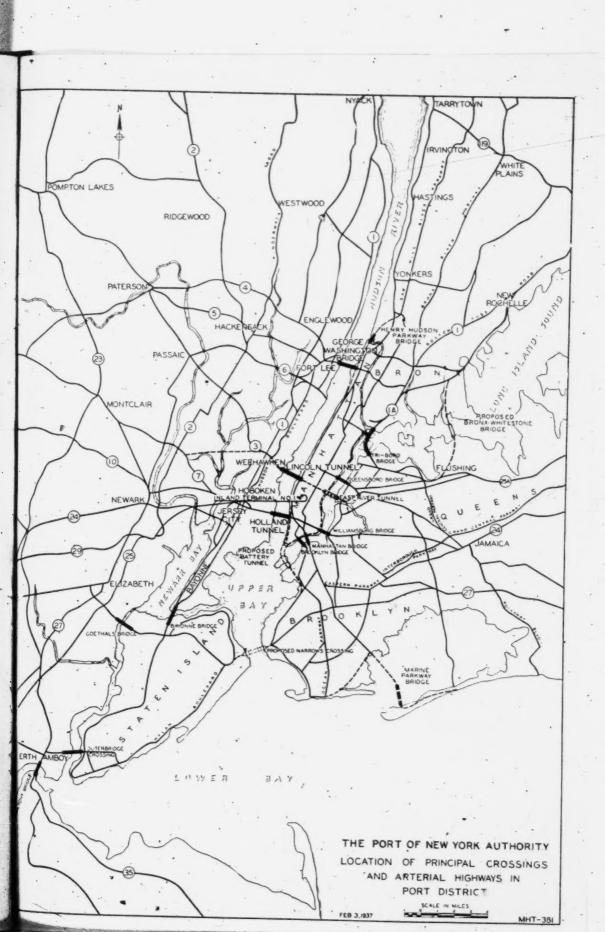
JULIUS HENRY COHEN,
Attorney for Respondents,
General Counsel for the Port of
New York Authority.

AUSTIN J. TOBIN, DANIEL B. GOLDBERG, On the Brief.



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CHARLES ELMORE OROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

Nos. 779, 780, 781.

GUY T. HELVERING, Commissioner of Internal Revenue,

PHILIP L. GERHARDT,
(And Related Cases)

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS AMICI CURIAE.

JOHN J. BENNETT, JR., Attorney General of the State of New York.

HENRY EPSTEIN, Solicitor General of the State of New York.

ALBERT A. CARMICHAEL, Attorney General of the State of Alabama.

U. S. WEBB, Attorney General of the State of California.

CHARLES J. McLAUGHLIN, Attorney General of the State of Connecticut.

P. WARREN GREEN, Attorney General of the State of Delaware.

OMER S. JACKSON, Attorney General of the State of Indiana.

GASTON L. PORTERIE, Attorney General of the State of Louisiana.

JOSEPH A. LORET, Special Assistant Attorney General, Louisiana.

PAUL A. DEVER, Attorney General of the Commonwealth of Massachusetts.

RAYMOND W. STARR, Attorney General of the State of Michigan.

GREEK L. RICE, Attorney General of the State of Mississippi.

HARRISON J. FREEBOURN, Attorney General of the State of Montana.

GRAY WASHBURN, Attorney General of the State of Nevada. DAVID WILENTZ, Attorney General of the State of New Jersey.

THOMAS P. CHENEY, Attorney General of the State of New Hampshire.

A. A. F. SEAWELL, Attorney General of the State of North Carolina.

HERBERT S. DUFFY. Attorney General of the State of Ohio.

I. H. Van WINKLE, 'Attorney General of the State of Oregon.

CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania,

JOHN P. HARTIGAN, Attorney General of the State of Rhode Island.

JOSEPH CHEZ, Attorney General of the State of Utah.

LAWRENCE C. JONES, Attorney General of the State of Vermont.

ABRAM P. STAPLES,
Attorney General of the
Commonwealth of Virginia.

G. W. HAMILTON, Attorney General of the State of Washington.

ORLAND S. LOOMIS, Attorney General of the State of Wisconsin.

RAY E. LEE, Attorney General of the State of Wyoming.

Attorney General of the State of Arizona.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 779.

GUY. T. HELVERING, Commissioner of Internal Revenue, Petitioner,

V.

PHILIP L. GERHARDT,

Respondent.

No. 780.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner.

V.

BILLINGS WILSON,

Respondent.

No. 781.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

V.

JOHN J. MULCAHY,

Respondent.

MOTION FOR LEAVE TO ARGUE ORALLY AND FILE A BRIEF AMICI CURIAE.

To the Honorable the Supreme Court of the United States:

Now come the undersigned, The State of New York, by its

Attorney General John J. Bennett, Jr., through Henry

Epstein, Solicitor General, as Counsel; The State of New

Jersey, by it Attorney General, David Wilentz; The State of Alabama, by its Attorney General, Albert A. Carmichael; The State of California, by its Attorney General, U. S. Webb; The State of Connecticut, by its Attorney General, Charles J. McLaughlin; The State of Delaware, by its Attorney General, P. Warren Green; The State of Indiana, by its Attorney General, Omer S. Jackson; The State of Louisiana, by its Attorney General Gaston L. Porterie, and by Joseph A. Loret, Special Assistant Attorney General; The Commonwealth of Massachusetts, by its Attorney General, Paul A. Dever; The State of Michigan, by its Attorney General, Raymond W. Starr; The State of Mississippi, by its Attorney General, Greek L. Rice; The State of Montana, by its Attorney General, Harrison J. Freebourn; The State of Nevada, by its Attorney General, Gray Washburn'; The State of New Hampshire, by its Attorney General, Thomas P. Cheney; The State of North Carolina, by its Attorney General, A. A. F. Seawell; The State of Ohio, by its Attorney General, Herbert S. Duffy; The State of Oregon, by its Attorney General, I. H. Van Winkle; The Commonwealth of Pennsylvania, by its Attorney General, Charles J. Margiotti; The State of Rhode Island, by its Attorney General, John P. Hartigan; The State of Utah, by its Attorney General, Joseph Chez; The State of Vermont, by its Attorney General, Lawrence C. Jones; The Commonwealth of Virginia, by its Attorney General, Abram P. Staples; The State of Washington, by its Attorney General, G. W. Hamilton; The State of Wisconsin, by its Attorney General, Orland S. Loomis; and The State of Wyoming, by its Attorney General, Ray. E. Lee, and pray leave to argue orally, for a period of

thirty minutes, in behalf of the position of the Respondents in the above cases, and to file the subjoined brief in support thereof.

The contentions made in these cases by the Commissioner of Internal Revenue are of vital concern to the States. Your Amici consider it fundamental that the Federal Government cannot interfere with nor burden the States or their instrumentalities in the exercise of their governmental powers and duties. There are no powers or duties higher in their governmental character than are the construction of bridges and highways and the development of ports and harbors. The decisions of this Court would appear to be conclusive as to the governmental character of state action in those fields, and have unanimously reaffirmed the constitutional necessity of state immunity from Federal taxation as essential to the preservation of our dual form of government.

In addition, these cases are an attack upon the right of sovereign States to cooperate by Compact in the solution of their common problems, free from the burden and interference of Federal taxation. As such, they cannot be construed otherwise than as an attack on the sovereignty of your Petitioners.

Your Amici therefore urge the importance of the decision in these cases, not only to the State of New York and New Jersey, but to every state in the Union. Each of your Petitioners has substantial interests at stake which are likely to be affected by the decision of the Court herein, both by reason of the fact that their sovereignty is necessarily affected and, more particularly, because your Amici, in the solution of their bridge, highway, canal, irrigation, sanitation, park, port and harbor, and similar governmental prob-

lems, have availed themselves of the efficiency and convenience of similar state or bi-state agencies. Indeed, the Commissioner's attack in these cases goes directly to the governmental character of such functions, even when carried out by the States themselves.

A holding in favor of the Commissioner's contentions here would tend to destroy the usefulness to all of the States, of the Authority or Commission method of achieving sound and efficient results and would adversely affect the political subdivisions and municipal corporations of the States in the performance of what have heretofore been regarded as normal and vital governmental functions.

The use of such state agencies and instrumentalities in expediting public work, the fundamental principle of American government, that of State sovereignty, the public credit of your Petitioners and that of all the other states in the Union—all of these matters of vital governmental importance—must be affected by the Court's decision in these actions. With all due restraint, your Petitioners feel that the brief submitted here by the Federal government is a shocking attack upon the rights of the States.

Wherefore, the States of New York, New Jersey, Alabama, California, Connecticut, Delaware, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming ask leave to be heard orally in the argument of the above cases, and pray that this Honorable

Court will accept the following brief for consideration. In addition to joining in the brief of all of the undersigned States, California also prays leave to submit the separate concurring memorandum which follows at page 50.

Dated: March, 1938.

- JOHN J. BENNETT, JR., Attorney General of the State of New York.
- ALBERT A. CARMICHAEL, Attorney General of the State of Alabama.
- U. S. Webb, Attorney General of the State of California.
- CHARLES J. McLAUGHLIN, Attorney General of the State of Connecticut.
- P. WARREN GREEN, Attorney General of the State of Delaware.
- OMER S. JACKSON, Attorney General of the State of Indiana.
- GASTON L. PORTERIE, Attorney General of the State of Louisiana.

- DAVID WILENTZ,
 Attorney General of the
 State of New Jersey.
- THOMAS P. CHENEY,
 Attorney General of the
 State of New Hampshire.
- A. A. F. SEAWELL, Attorney General of the State of North Carolina.
- HERBERT S. DUFFY,
 Attorney General of the
 State of Ohio.
- I. H. VAN WINKLE, Attorney General of the State of Oregon.
- CHARLES J. MARGIOTTI,
 Attorney General of the
 Commonwealth of
 Pennsylvania.
- JOHN P. HARTIGAN, Attorney General of the State of Rhode Island.

JOSEPH A. LORET, Special Assistant Attorney General, Louisiana.

PAUL A. DEVER,
Attorney General of the
Commonwealth of
Massachusetts.

RAYMOND W. STARR, Attorney General of the State of Michigan.

GREEK L. RICE, Attorney General of the State of Mississippi.

HARRISON J. FREEBOURN, Attorney General of the State of Montana.

GRAY WASHBURN, Attorney General of the State of Nevada. JOSEPH CHEZ, Attorney General of the State of Utah.

LAWRENCE C. JONES, Attorney General of the State of Vermont.

ABRAM P. STAPLES,
Attorney General of the
Commonwealth of
Virginia.

G. W. HAMILTON, Attorney General of the State of Washington.

ORLAND S. LOOMIS, Attorney General of the State of Wisconsin.

RAY E. LEE,
Attorney General of the
State of Wyoming.

HENRY EPSTEIN,
Solicitor General of the
State of New York,
Of Counsel.

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1937.

No. 779.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

V.

PHILIP L. GERHARDT,

Respondent.

No. 780.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

v.

BILLINGS WILSON,

Respondent.

No. 781.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

V.

JOHN J. MULCAHY,

Respondent.

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS AMICI CURIAE.

Statement.

In these cases the Commissioner of Internal Revenue is attempting to tax a bi-state instrumentality created solely for the planning and development of a port district, its highways and waterways.

>

The Court has itself made clear the duty of the States to defend themselves against such attacks. In Willcuts v. Bunn, 282 U. S. 216, in rejecting a claim of immunity, the Court said (p. 233):

"No state has ever appeared at the bar of this court to complain of this federal tax."

Your Amici desire, by their appearance here, to reject any such inference in these cases.

While the following brief is necessarily confined to the record here, the decision may well be controlling as to the immunity of agencies in all of the States, and, indeed, as to the States themselves, in the development of their ports, bridges, highways, and in similar functions.

The Port Authority was created by an interstate Compact of April 20, 1921, between the States of New York and New Jersey, pursuant to the Acts of their respective legislatures (Chapter 154, Laws of New York, 1921 and Chapter 151, Laws of New Jersey, 1921), consented to by joint resolution of the Congress of the United States (Public Resolution No. 17—67th Congress, S. J. Res. 88). This Compact of 1921, by its very terms, supplemented the earlier Compact of 1834 between the two States.

It is the position of your Amici, the States submitting this brief, that the work of a state agency such as the Port Authority, in developing the common port and harbor of the States of New York and New Jersey and in providing highway connections between the two States, is the very highest type of sovereign function and, as such, immune from Federal taxation. The argument of the Government goes to the extent of holding that since Congress has the paramount power to regulate interstate commerce, every activity in this field is subject to the taxing power of the Federal Govern-

ment. Such an argument, of course, makes it immaterial whether the property or enterprise is carried on by the States through a municipal corporation such as the City of New York, or through a corporate instrumentality such as The Port of New York Authority, or indeed by the State itself.

There is here no question of an extension of the doctrine of constitutional immunity. This case is definitely not within the "zone of debatable ground" recently referred to by the Court. The decisions of this Court in New York ex rel. Rogers v. Graves, 299 U. S. 401 and Brush v. Commissioner, 300 U. S. 352, are conclusive as to the governmental character of highway and waterway development. Indeed, the Port Authority satisfies even the requirement of governmental status expounded by the opinion of the dissenting Justices in the latter case. So too, the Port Authority is immune under the principles so recently reaffirmed by this Court in James v. Dravo Contracting Company, 82 L. Ed. Adv. Ops. 125, and in Helvering v. Therrell, 82 L. Ed. Adv. Ops. 537.

While, as we have stated in the foregoing Petition, all the States appearing here have substantial interests in these cases, your Amici, the States of New York and New Jersey, are the principals of the Port Authority. They hold direct title to much of the property it operates, directly control its revenues, and have the joint and ultimate ownership of all its bridges, tunnels and port facilities.

However, every State in the Union is performing functions similar to those of the Port Authority in the development of bridges, highways, irrigation and sanitation projects, parks, ports, and harbors and related fields of necessary governmental activity. In the State of New York, for instance, there is a Department of Public Works, including among its

five divisions a Division of Canals and Waterways and a Division of Highways.1 The functions of these Divisions in developing and operating waterway facilities, including the Erie Canal system, with its docks and terminals, all owned by the State, and in the construction and operation of State bridges and highways, are in all respects the same as the functions exercised by the States through the Port Author-Their Superintendent is appointed by the Governor just as is a Commissioner of the Port Authority. The Department of Public Works is one of the eighteen Departments which comprise the Government of the State of New York.2 Since the whole contention of the Commissioner in these cases goes to the nature of the function, no distinction whatever can be made between a Federal Tax on a State Superintendent of Public Works and a Federal tax on an employee of a municipal corporate instrumentality of the State.

From the viewpoint of your Amici this case was of most serious consequence even before the service of the Federal Government's brief. When, for the first time in this Court, the Government took the flat position that the revenues of a state agency are taxable, the case presented an issue such as the states of this Union have seldom had to face in the last century and a half. For, as we shall show, the revenues which the Federal Government seeks to tax belong entirely to the States of New York and New Jersey. They are devoted entirely to the liquidation of the debts which the two States

¹ Section 10, Public Works Law, McKinney's Consolidated Laws of New York.

² State Department's Law, Chapter 78, McKinney's Consolidated Laws of New York.

have directed their agency to incur in the construction of port bridges, tunnels and terminals.

Summary of Argument.

I. The necessities which brought about the creation of the Port Authority demanded joint governmental action by the States of New York and New Jersey. Those two States are here in fulfillment of the pledge of their Compact of 1921 to carry on "faithful cooperation in the future planning and development of the port of New York." They are joined here by their sister States which, facing similar necessities, have always exercised the governmental functions which the Federal Government now seeks to tax. The governmental problems which brought about the creation of the Port Authority are the problems of a district historically, commercially and economically one, but divided by a political boundary line. The problems of port and highway organization in this district put upon the States tremendous financial burdens, and imposed grave governmental duties affecting the health and welfare of millions of people in both states.

A reversal of the decisions below would destroy the usefulness of the authority method of achieving governmental results and would permit direct interference with the states in the performance of what have heretofore been regarded as normal and vital governmental functions.

II. The governmental character of the functions exercised by the Port Authority is established both from the purposes of its creation and from the traditional exercise of those functions by governments generally. Its functions of port and highway development therefore meet the tests for immunity considered and followed by this Court in New York ex rel. Rogers v. Graves, 299 U. S. 401 and Brush v. Commissioner, 300 U. S. 352.

III. The Port Authority is an integral part of the governments of the States of New York and New Jersey. It was created by Compact and is clothed with attributes of state sovereignty.

IV. A tax upon the Port Authority would impose a direct monetary burden upon the States of New York and New Jersey themselves. Its revenues belong to those two States and are disposed of only in accordance with the statutory directions of the States. The States have made outright appropriations of almost \$3,000,000. to the Port Authority projects; they have made advances of over \$18,000,000; they have pooled their revenues for the effectuation of a comprehensive plan of port and highway development. The Government obviously treats this case as the first step toward taxing those state revenues. The tax burden sought to be imposed in these cases, in increasing the operating expenses of the Port Authority, will either indefinitely postpone, or else forever prevent the return of the States' advances for these port projects.

POINT I.

The governmental necessity for the creation of the Port Authority.

In all of the States, it has been necessary, in the interest of governmental progress and efficiency to carry on certain state functions through instrumentalities created for that purpose. The necessities for governmental action which brought about the creation of The Port of New York Authority are typical of the problems facing all of your Amici.

The States of New York and New Jersey are here in fulfillment of their pledge of "faithful cooperation in the future planning and development of the port of New York," Compact of April 30, 1921, Article I (Stipulation, Ex. E, p. 14). The joint agency which the two States created by that Compact, and the Comprehensive Plan of port and highway development which they entrusted to that agency, are here under an attack (Record, folio 311; Government's Brief, pp. 45, 47, 56) which, if 'carried to its ultimate objective, may bankrupt the agency and destroy the plan.

By way of contrast with this cooperation between those two States, their early history reveals a record of distrust, rivalry and open reprisal over and around the waters of New York harbor which too often characterized their relations in the past, and which compelled their resort to Compact. Similar controversies between the states have arisen throughout the country and, happily, are being peaceably disposed of by interstate compact. Yet the Government argues (Brief, Pt. II) that the very fact of entry into the Compact makes a bi-state agency taxable!

The early conflicts between New York and New Jersey arose out of the existence of a boundary line, separating the two States politically, but in actual effect dividing a district historically, commercially and economically one. Thus the great case of Gibbons v. Ogden, 9 Wheat. 1, arose out of a

¹ All Record citations which follow refer to the original page numbers of the Circuit Court Record, which appear in the Transcript of Record here as marginal numbers similar to folio numbers. For convenience, "Record, folio" will hereafter be cited "Rec. f."

controversy between the two States over their jurisdiction in the Port of New York. The monopoly granted to Livingston and Fulton controlling steamboat traffic over New York waters (New York Act of April 5, 1803) brought a wave of indignation from New Jersey. New York enacted that, if anyone should navigate a steamboat within her jurisdiction without a license, the parties aggrieved might seize the boat and its equipment. New Jersey, in retaliation, ordered that if anybody seized a boat belonging to a citizen of New Jersey lying upon the waters between the two States, the owners might seize any New York boat found in New Jersey waters. It seems hard to realize today, but the two States were actually on the verge of war as a result of these and similar incidents.

Another conflict over their jurisdiction in the port district arose in 1826 when a Deputy Sheriff of Richmond County, New York, was arrested and indicted by New Jersey authorities for serving process within the jurisdiction of New Jersey, New Jersey claiming ownership of Staten Island (Stip. Ex. B, p. 42).

Finally, after a long series of such irritating incidents, came a course of negotiations between the States, culminating in the Treaty of 1834, setting up the boundary line between the two States as it is now fixed and apportioning their jurisdiction over the waters and islands of the harbor (Stipulation Exhibit B, pp. 42-44).

At about the time of this Treaty, however, the foundation was being laid for another great conflict. The population of the Port District continued to mount, an ever increasing volume of industrial commerce centered upon New York City, and the harbor became the terminus of the great network of railways which spread out across the continent.

However, the harbor waters prevented the entrance of the railroads into the City itself, and necessitated expensive and wasteful ferriage across the river and bay.

This finally led to a claim that an equality of railroad rates to both sides of the harbor was prejudicial to the interests of New Jersey, and resulted in the New York Harbo: Case, 47 I. C. C. 643 (Rec. f. 47, 278-279).

The case caused widespread public discussion of the problem of port organization. As a fortunate result, the proceeding had an educative influence upon all those concerned with the future development of the port district (Rec. f. 47, 279). Even while the case was pending, there gradually emerged the conception that whatever the States might gain through the litigation, they could gain more through interstate cooperation.

This conviction culminated in the creation of the Port Authority, in 1921, by a new interstate Compact amending and supplementing the Treaty of 1834. During the same period the two States had begun to cooperate in the construction of the Holland Tunnel, paid for out of their own funds and through the medium of coordinate state commissioners (Rec. f. 299, 303).

Through such cooperation the two States went straight to the heart of these interstate differences—the inevitable conflicts of a great economically unified harbor area, divided by a political boundary line.

No one can read the history of the deliberations of the two States, which brought about the Compacts creating the Port Authority (Rec. f. 46-48, 278-284), and the Holland Tunnel Commissions (Rec. f. 299, 300), without becoming thoroughly convinced that here again were necessary acts of sovereign cooperation covering that very type of govern-

mental dispute over boundaries, commercial preferences and trade routes, for want of which today, in the larger theatre of international affairs, the peace of the world is constantly in danger.¹

The precedent for this type of interstate treaty or compact may be found in the early recognition of the importance of preserving peaceable relations between two neighboring colonies. In 1785, after years of constant bickering between Virginians and Marylanders over traffic on the Potomac, Commissioners from the two States met at Mount Vernon. Their deliberations resulted in the "Mount Vernon Compact" fixing the rights of those two States in their common waterways, ports and harbors, and ultimately led to the adoption of the Federal Constitution itself.²

The governmental problems which faced the States of New York and New Jersey in the development of the Port of New York are thoroughly set forth in the Record in these cases and in the Respondents' Brief. Those grave public necessities, touching the health and welfare of the millions of people of the Port District are detailed in the Report of 1919 of the Bi-State Legislative Commission (Stip. Ex. B; see particularly pp. 1 to 40). They are summarized in the

¹ The language of this Court in *Helvering* v. *Therrell*, 82 L. Ed. Adv. Ops. 537, emphasizes the importance of the rule of immunity in preventing just such conflicts between the State and Federal Governments:

[&]quot;The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserve powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them."

² See Burton J. Hendrick, Bulwark of the Republic (1937), pages 11 and 12; also pages 52 to 55.

Findings of the Court below (Rec. f. 47-48). We need only point out here that the problem of port development faced by the two States in 1916 was regarded as one of the most compelling governmental problems which ever faced the people of that area. The density of population, the enormous concentration of commerce, the resulting traffic congestion, all called for the immediate development of efficient port and highway facilities. The entire freight handling system of the port area was antiquated. Waterfront properties were overrun with wasteful railroad pier stations to the exclusion and loss of steamship traffic. No adequate provision for the motorization of vehicular traffic had been made. streets and highways of the Port District had become so clogged and congested that business was becoming paralyzed and the streets had become a menace to public health and safety. The picture was one of confusion, economic paralysis and colossal waste which called upon the governments of two States to act and to act promptly.

The States met their responsibility in this situation. They devised a method, and surmounted the problem of the enormous tax burden that such a program would ordinarily have entailed, by the creation of a bi-state, self-liquidating public agency which they designated their "municipal corporate instrumentality." Through this instrumentality they brought into being the vehicular bridges and tunnels, the coordinated freight handling facilities and terminals, the express highways, and the modern port facilities which the solution of the problem demanded.

When the Commissioner of Internal Revenue attempts to tax the Port Authority, because of its creation by Compact, he challenges the power of all of the States in the Union to resort to the cooperative solution by treaty of their joint and mutual problems. For obviously they cannot enter into Compacts if that very act gives rise to a tax liability. The States are here to preserve such instruments.¹

The effect of a decision in these cases in favor of the contention of the Commissioner would be to prevent or deter the states from using the municipal corporate method of carrying out necessary governmental works. Prior to the creation of the Port Authority, the customary method of carrying out governmental projects was through departments' or commissions, payment being made directly out of treasury funds—that is, tax funds or the proceeds of bond issues. To this single fact may be attributed much of the enormous growth and heavy burdens of state and municipal indebted-The Authority method is a necessary departure. Under it one or more states establish an agency of government which is charged with the effectuation of a public project and the collection of tolls or charges from the users thereof to liquidate the cost of the enterprise. The tax is on users and not upon general taxpayers. This method was put on trial in the case of The Port of New York Authority. Its success has caused its use to become widespread.² By this plan sovereign property and revenues are allocated to specific works and a part of the public debt is insulated

¹ The Palisades Interstate Park Commission of New York and New Jersey is a nice instance of the necessity for such compacts. There were originally two such Commissions, one in each state. The matter of police jurisdiction, of continuity of title and other duplications of administration,—all led inevitably to the necessity for a compact. The reasons are cogently stated in the recent report of the Congressional Committee recommending consent. (H. R., Report No. 1382. 75th Cong.—1st Sess.)

² See Wilson Chamberlain, "I'll Pay My Own Way—Tolls Take the Strain off Taxes," The Forum, April 1938, p. 247.

from the general tax burden. This is the method under attack here. Must the States give up their freedom to select such instrumentalities and return to a method involving greater tax and debt burdens? If the construction of necessary public works is to go forward today, this authority method must be retained unimpaired.

There are in all the States municipal corporate agencies and districts of varied character, self-liquidating either wholly or in part. These governmental agencies all perform what heretofore have been regarded as normal and vital governmental functions. Among these functions are those of water supply, sewerage disposal, fire protection, paving, parks, hospitals, canals, highways, bridges, vehicular tunnels, education, parkways, irrigation, drainage, and port and harbor development.

These projects cannot be carried forward on a sound, self-liquidating basis if they are to be burdened by federal taxation. They are financed and have been financed for the past two decades, on the assumption of immunity, whether carried on by the states themselves or by their agencies. Certainly it has always been supposed that the states could perform such functions without federal tax interference. And their freedom to select such instrumentalities as may most efficiently accomplish their governmental purposes has been emphasized by this Court time and time again.

POINT II,

The Port Authority is engaged in an essential governmental function.

The States submit that the immunity of the Port Authority in no way curtails the Federal taxing power. That power has never extended to port, harbor, bridge and highway development by the States. There is, therefore, no question here of an extension of a doctrine of Constitutional immunity to "businesses which constituted a departure from usual governmental functions" (Helvering v. Powers, 293 U. S. 214, 225; Brush v. Commissioner, 300 U. S. 352, 361). Certainly it cannot be seriously debated that governments, ancient and modern, have treated the construction and operation of their highways and bridges, and the development and control of their ports, as among their high sovereign duties. Even the Petitioner admits this (Brief, p. 63). Here is no question, such as was raised in the Brush case, as to whether the states might, with immunity, properly take over a function which had largely been exercised by private utility companies in many parts of the country. Here is no question, as there was in the Rogers case, as to whether the Federal Government might supplant the private ownership of a New York corporation in the operation of a railroad, hotels and steamships. If this Court was of opinion that the functions there were governmental, then a fortiori the functions of the Port Authority are within "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government granted by the Constitution." (Helvering v. Therrell, 82 L. Ed. Adv. Ops. 537.)

The method of analysis followed by this Court in Brush v. Commissioner, 300 U. S. 352, New York ex rel. Rogers v. Graves 299 U. S. 401 and Helvering v. Therrell, 82 L. Ed. Adv. Ops. 537, indicates two primary considerations or tests to be applied in determining the governmental character of a function exercised by a State agency. The first looks to the purposes for which the agency was established and the second considers the tradition and history of government exercise of that function. The States submit that the Port Authority meets both tests.

First. The record establishes that The Port of New York Authority was created for the following sovereign governmental purposes: preservation of peaceful relations between New York and New Jersey, the planning and development of the Port of New York District, and the preservation of the health, safety and welfare of its inhabitants.

These purposes are all set forth in Point I, where we have shown the necessities for State action creating the Port Authority. They are stated in the Report of the New York, New Jersey Port and Harbor Development Commission, which studied the port problem (Stip. Ex. B, pp. 1 to 38). As appears from that study and from the whole Record here (Stip. Rec. f. 11, 278; Findings, Rec. f. 47, 48, 62 et seq.), the two States felt it necessary to take drastic steps to insure the solution of a port problem which was threatening the supply of food, fuel and other necessities of life to millions of their inhabitants, and lowering their standard of living. They therefore adopted a Comprehensive Plan of port development, including necessary bridge and tunnel connections over and under the harbor waters, linking their highway systems. We need not amplify the governmental

duties called into being by these conditions, nor the governmental character of the functions which were accordingly exercised. They should be decisive here, as they were in the *Brush* and *Rogers* decisions.

Second. The historical and traditional governmental character of the functions exercised by the Port Authority, are sufficiently indicated, for the purposes of this brief, in the following precedents. They are more thoroughly developed in the Respondent's Brief.

Though, of course, the interstate toll bridges and tunnels which have been constructed by the Port Authority are state highways in every sense, your Amici wish to point out particularly that the Port Authority has spent approximately \$36,000,000 for the construction of connecting highways in New York and New Jersey, which are operated without toll or charge of any kind. (See Rec. f. 406-410, 469).

Thus, the New Jersey highways running westerly from the Lincoln Tunnel, were constructed by the Port Authority at a cost of \$19,864,000., raised by its own bond issues. They are to be given, in fee, to the New Jersey State Highway Department. These arterial highways include three-level safety intersections of unprecedented design. They extend for a distance of almost three miles across the Palisades, traversing three municipalities, connecting with and forming a part of the New Jersey-New York state-wide highway systems. In New York, reorganization of the City's street system, provided for under the Acts authorizing the construction of the Lincoln Tunnel, necessitated the construction of two entirely new avenues in Manhattan, both running from 34th to 42nd Streets and freely open to all city traffic. The cost of these

two avenues was \$7,133,000, all of which was borne by the Port Authority.

The public highways constructed in New Jersey to the west of the George Washington Bridge cost \$6,400,000. After their construction, the Port Authority conveyed them to the New Jersey State Highway Department which operates them as public highways without toll. On the New York side of the George Washington Bridge additions to the City's street system, carrying highway traffic across the entire Island of Manhattan, cost \$2,500,000. They were constructed by the Port Authority at its own expense and are likewise open to the public without toll.

This Court would seem to have upheld the governmental character of the Port Authority's functions in the construction and operation of bridge, tunnel and highway facilities. In New York ex rel. Rogers v. Graves, 299 U.S. 401, holding that such activities were an exercise of governmental functions, the Court said (p. 406):

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation."

When in the Rogers case your Amicus, the State of New York, attempted to tax an employee of the Paṇama Rail Road Company, the Court unanimously upheld the governmental character of that company as an incident of the operation of a great Federal waterway and highway development. Here the States support the immunity of their agency engaged directly in the development of their waterways and highways. As indicated by the foregoing quotation from

the Rogers case, the Court itself has pointed out the identity between bridges, highways and canals. The States ask only reciprocity and equality of treatment.

Two months later, in *Brush* v. *Commissioner*, 300 U. S. 352, the Court reaffirmed its position as to the governmental nature of highway development. The Court there said (pp. 372, 373):

"The state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (see *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628); but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

This Court has pointed out that it is the governmental duty of the States to assume the management and control of their port and harbor properties. *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, 452, 453. In that case the court pointed out that as a matter of public policy it could not

"sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." (Italics ours.)

It would be futile to attempt to add anything to what the Circuit Court of Appeals for the Second Circuit said as to the historic governmental character of port development, in Commissioner v. Ten Eyck, 76 F. (2d) 515, 517, 518:

"Historically, port activities have been shown to be almost universally, directly subject to the supervision

of agencies of government. * * *

"The necessity of a comprehensive plan for the organization and development of port facilities in the principal harbors of this country has been recognized, and steps have been taken to vest in the control of properly constituted governmental agencies the future development of many of its ports. A Bi-State Commission was appointed to consider the requirements of New York and New Jersey, clearly an effort within the sovereign prerogatives of the respective states. They joined in an agreement for the creation of a governmental agency and endowed that agency with adequate powers to carry out remedial measures for the alleviation of traffic congestions within, and further development of the facilities of, the Port of New York. It resulted in the creation of the Port of New York Authority. This action was a recognition of the importance, as a governmental desire, of the proper development and operation of the Port of New York. * *

"Therefore, it is clear that ownership, control, and operation of port facilities are essentially and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States." (Italics ours.)

Even in the Brush case below, 85 F. (2d) 32, 35, the Circuit Court in holding to the same views as were here expressed in the dissenting opinion, that municipal water supply was not governmental, nevertheless upheld the immunity of port and harbor development in the following language:

"Our decision in Commissioner v. Ten Eyck, * * * was controlled by the traditional supervision exercised by government over seaports and stands apart from the decisive features here."

The principles of constitutional immunity are expressly reaffirmed by the Court in the course of its opinions in

James v. Dravo Contracting Company, 82 L. Ed. Adv. Ops. 125, and in Helvering v. Therrell, 82 L. Ed. Adv. Ops. 537. We conclude that, within those constitutional principles, long established and so recently reaffirmed, The Port of New York Authority and its employees are engaged in essential governmental functions of the two States and are immune from Federal taxation.

POINT III.

Governmental relationship between the Port Authority and the two States.

The Government argues that, even if the functions of the Port Authority are immune, the Board and the Circuit Court below nevertheless erred in holding that the Port Authority functioned as an agency created by the States of New York and New Jersey, and that Congressional consent to the Compact destroyed the sovereign character of the States' action (Brief, Point II). Further, the Government declares that the existence of the Port Authority as "a separate corporate entity" shows that it was created "without reference to the normal governmental functions of either State." (Brief, p. 32).

In answer to the second of these two contentions your Amici submit that both in its creation and in its functions the Port Authority is in all respects the direct and governmental agency of the two States alone, completely integrated into the very machinery of their State governments.

In his opinion of November 10, 1925, the Honorable Charles Evans Hughes succinctly stated the considerations that led him to the conclusion here reached by your Amici. He said:

"The Port of New York Authority created by the

Compact is a public agency of the two States.

"The port authority is manifestly not a private agency. It is established for public purposes. These purposes relate to the development of terminal, transportation and other facilities of commerce in the port of New The port authority consists of Commissioners appointed in the manner defined by the legislatures of: the two States; that is in the case of New York, by the Governor, with the advice and consent of the Senate, and in the case of New Jersey, directly by the legislature in the first instance and thereafter, as vacancies occur, by the Governor with the advice and consent of the Senate. The authority to be exercised, as shown by the Compact, the Comprehensive Plan, and the supplementary legislation, is a public authority; that is it is an authority granted by the legislatures and to be exercised on behalf of the public by representatives of the States.

"The immunity of the bonds from Federal taxation follows from the fact that, as already stated, the port authority is a public agency, a governmental instrumentality of the two States."

The States of New York and New Jersey established The Port Authority by treaty, declaring it to be "a body corporate and politic." (Rec. f. 45). They declared that:

"The port authority shall be regarded as the municipal corporate instrumentality of the two states * * *"

In the legislation directing the activities of the Port Authority, it is constantly referred to as a "body politic,"

¹ Chap. 43, Laws of New York, 1922, and Chap. 9, Laws of New Jersey, 1922. (Stip. Ex. E p. 44).

a "municipal corporate instrumentality," and as the "agency" of the two States for the effectuation of the pledge of cooperation in the Compact. (Rec. f. 287).

Recently, in discussing the Buffalo and Fort Erie Public Bridge Authority, similarly described by the Legislature as "a municipal corporate instrumentality," the New York Court of Appeals referred to a list of state authorities, including the Port Authority, and said:

"We have held that similar bodies corporate created to act for the State in carrying out a public purpose are State agencies. (Gaynor v. Marohn, 268 N. Y. 417, and cases there cited.) We find that the corporate body here created is such an agency of the State. Indeed, in the opinion by Crane, Ch. J., in the cited case, the statute now challenged is included in a list of statutes which have created municipal corporations or districts to carry out a governmental power." Buffalo and Fort Erie Public Bridge Authority v. Davis, decided March 8, 1938.

The accuracy of the legislative descriptions of the Port Authority is borne out by the many attributes of sovereignty with which the States have invested it—attributes of sovereignty possessed only by States themselves or their direct governmental instrumentalities.

Compact, Art. III (Stip. Ex. E, p. 18); Comp. Plan (Stip. Ex. E, pp. 30, 33); Chapter 64, Laws of New Jersey, 1927 (Stip. Ex. E, p. 185); Section 1, Chapter 277, Laws of New Jersey, 1927 (Stip. Ex. E, p. 203); Section 1, Chapter 421, Laws of New York, 1930 (Stip. Ex. E, p. 233); Section 1, Chapter 247, Laws of New Jersey, 1930 (Stip. Ex. E, p. 251); Section 4, Chapter 700, Laws of New York, 1933 (Stip. Ex. E, p. 334); Resolution of the Senate of the State of New York of March 7, 1935 (Supplement to Stip. Ex. E, p. 19); New York Concurrent Resolution of February 2, 1931 (Stip. Ex. E, p. 262); New Jersey Joint Resolution of February 2, 1931 (Stip. Ex. E, p. 258).

In the first place, the Commissioners who compose the Port Authority are "chosen by the State of New York and " " by the State of New Jersey." Initially, your Amicus, the State of New Jersey, actually appointed its Commissioners by public act which named them specifically (Chap. 152, Laws of New Jersey, 1921). When the number of Commissioners was increased, your Amicus, the State of New York, similarly appointed the additional members. At the present time the Legislatures have delegated their power of appointment to the highest executive officer of each State with the advice and consent of his respective Senate (Rec. f. 67).

New Jersey Commissioners of the Port Authority can only be removed "upon charges and after a hearing by the Senate," and New York Commissioners may be removed only "upon charges and after a hearing by the Governor of the State." As in the case of all servants of the two States, the Commissioners and their employees take an oath of office. The Commissioners' terms are fixed by statute (Rec. f. 67, 324). So, too, the States have by statute extended to the Port Authority's employees rights and privileges given only to employees of the States, such as membership in the State Retirement System.² (Rec. f. 69, 323).

The two States have by law decided that the Port Authority may maintain a police force and have designated the members of this police force as peace officers of both States,

¹ Sec. 6, Chap. 422, Laws of New York, 1930 (Stip. Ex. E, p. 238) and Sec. 2, Chap. 245, Laws of New Jersey, 1930 (Stip. Ex. E, p. 249).

² Chap. 259, Laws of New York, 1935 (Supplement to Stip. Ex. E, p. 21).

along with municipal policemen, sheriffs, constables and other law enforcement officers (Rec. f. 54, 325).

Aside from this status of the officers and employees of the Port Authority, the integration of the Authority with the political and governmental systems of the two States, appears from the method of official action which they have prescribed for it. Article XVI of the Compact, reserves to each State the right "to provide by law for the exercise of a veto power by the Governor thereof over any action of any Commissioner appointed therefrom." And pursuant to this reservation, they have delegated such a veto power to their respective Governors. (Rec. f. 67, 323).

The direct control the States have reserved over their agency is emphasized also by the requirement that the Authority must report annually to the Legislatures and Governors of both States and that it must so report also at such other times as required so to do (Compact Art. VII; Rec. f. 324).

In Point IV, we shall review the States' direct control of all of the revenues of the Port Authority and their reservation of the right to direct their disposal, their advances of over eighteen million dollars, and their outright appropriations of almost three million dollars in aid of the port development program.

Fee title to the Holland Tunnel is held directly by the two States, the Port Authority's agency being limited to operation and maintenance. Indeed, such title as the Port Authority has to all of the other bridges, tunnels and terminals is strictly limited by its legal position as the agent

¹ Chapter 333, Laws of New Jersey, 1927 (Stip. Ex. E, p. 206) and Chapter 700, Laws of New York, 1927 (Stip. Ex. E, p. 208).

and trustee of the two States. Like any principals, the States are at all times free to dissolve the Port Authority and take over its properties directly. They would then hold outright title to all of their port projects—assets which the Government is here seeking to diminish.

The broad governmental powers which the States have vested in the Port Authority are only accorded to instrumentalities truly governmental. When, in Article XVIII of the Compact, the States authorized the Port Authority "to make suitable rules and regulations * * * for the improvement of the conduct of navigation and commerce, which when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby" (Rec. f. 63, 68, 325, 327), they invested the Port Authority with the most governmental of all functions—law-making.

Article XIX provides for the imposition of penalties for the violation of any such rule or regulation of the Port Authority. Pursuant to these sections, both States have ratified regulations of the Port Authority and made violations of them an integral part of the Criminal Law of both States. The Criminal Courts of both States are given jurisdiction to enforce the penalties provided (Chapter 599, Laws of New York, 1932; Stip. Ex. E, p. 320; Chapter 113, Laws of New Jersey, 1932; Stip. Ex. E, p. 321).

The significance of such power of the Port Authority was pointed out in State v. Port of Astoria, 79 Ore. 1, 154 Pac. 399. The Court said (at pp. 15, 16):

"It is true that 'rules' and 'regulations' are the terms employed; but the mere names are not conclusive, because the thing named is described in detail; and from the description the substance is known, and the thing called a 'rule' or 'regulation' is, in fact, an ordinance or a municipal law carrying a fine or penalty or punishment for a violation.

"The legislature has therefore viewed the port as a municipality; (a) By defining it to be a municipality; (b) by granting authority to exercise functions of government, to enact certain laws, and to provide fines, penalties and punishments for violations;" (Italics ours.)

Other regulatory powers which the States have granted to the Port Authority include the power to hold investigations in connection with matters pertaining to the planning and development of the Port of New York (Rec. f. 67, 327). For such purposes there is an express grant of jurisdiction of any and all persons residing in, or owning property within the enacting state, including power to issue subpoenas in connection with such jurisdiction (Rec. f. 67, 327). For failure to comply with such Port Authority subpoenas, the Supreme Court in New York may, upon application of the Port Authority, commit such offender to jail or otherwise punish him for contempt (Chapter 623, Laws of New York, 1924).

By the same legislation the State of New York provides that orders of the Port Authority, with respect to regulation or control of port affairs within its jurisdiction, are enforceable by mandamus or injunction, or any other relief appropriate to the case. Furthermore, actions and proceedings involving the Port Authority are entitled to a preference on the court's calendars "over all civil actions" (Rec. f. 68, 327).

Of significance likewise is the grant by both States of the power of eminent domain (Rec. f. 68) and the recognition that the Port Authority may change the grade of public high-

ways without liability for damage to the owners of abutting property (Chap. 186, Laws of New Jersey, 1935 [Supplement to Stip. Ex. E, p. 41] and Chap. 876, Laws of New York, 1935 [Supplement to Stip. Ex. E, p. 40]). Change of grade is damnum absque injuria only when done by a State governmental agency.

Another significant immunity of the Port Authority is its exemption, both by statute and by common law, from State and municipal taxation with respect to its property and the securities it issues (Rec. f. 68, 330). In Bush Terminal Company v. The City of New York, 152 N. Y. Misc. 144 (1934), the New York Supreme Court made clear that the immunity of Port Authority terminals, or any other facilities developed in pursuance of the Comprehensive Plan, followed as a matter of course from the municipal and governmental character of the Authority as an agency of the States. Similarly, the special appropriations made by the States for the initial support of the Port Authority (Rec. f. 63, 66, 309, 310), would have been unconstitutional if extended to a private corporation. (New York Constitution, Art. VIII, Sec. 9, and New Jersey Constitution, Art. I, Par. 20.)

It is stipulated (Rec. f. 342), and the Board below has found as a fact (Rec. f. 68):

"The Port Authority has no stock and no stockholders, and is not owned by any private persons or corporations. Its projects are all operated in the interest of the public, and no profits inure to the benefit of private persons."

As was said by the Supreme Court of Washington concerning the Port of Seattle in *Paine* v. *Port of Seattle*, 70 Wash. 294; 127 Pac. 580; 126 Pac. 628:

"The object of this incorporation is to provide public terminal facilities for both sea and land commerce, or, perhaps, better, to provide a place open to the entire public where sea and land traffic may meet for the purposes of exchange. This being its object, we think it may be deemed a municipal corporation, * * *" (Italics ours).

And in Alabama State Bridge Corporation v. Smith, 217 Ala. 311, 315; 116 So. 695, the Supreme Court of Alabama said:

"It is intended to put into use and operation public funds and agencies of the states for the common benefit of the people of the state. It would construct bridges for the public use and, in the end, free to the public. It is an arm of the state, with none of the limitations, disabilities, or responsibilities that affect private corporations as such."

With all of these attributes bestowed upon it by the States, there would seem to be no escape from the conclusion that the Port Authority is indeed a direct governmental instrumentality of the two States, and of the two States alone. In reviewing them we have been mindful of this Court's statement in James v. Dravo Contracting Co., 82 L. Ed. Adv. Ops. 125, 138:

"We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government 'that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.'"

But the government contends that congressional consent automatically destroys the sovereign character of any action

that the States may take by compact. In support of this extraordinary theory the Federal Government's brief refers to the memorandum filed by the United States Attorney General in Hinderlider v. The LaPlata River and Cherry Creek Ditch Company, No. 437, Present Term, and refers to the argument therein that a compact has the status of an Act of Congress (Petitioner's Brief, Point II). Your Amici ask, in turn, that the memorandum filed in the same case by the States of Delaware, Maryland, New Jersey and New York, The Port of New York Authority and the Delaware River Joint Commission (in which memorandum the States of Virginia and Oregon also joined), be considered here in refutation of that contention. Neither in that case (see Attorney General's memorandum dated February, 1938) one in its brief here has the Government attempted to reply to the arguments and authorities in that memorandum of the States.

The constitutional provision requiring consent to an interstate compact has been described by the authorities as more in the nature of a quasi-judicial than a positive legislative function. Congress' power, in this respect, was to protect and to preserve rather than to create. The Government's comparisons all but suggest that the states' request to Congress for consent to an interstate compact should "be humbly addressed by both Governments for his Royal Approbation" (Brief, p. 49, footnote 21). Your Amici, under the impression that they are sovereign States, cannot concur in this analogy. On the contrary, the decisions of this Court would seem to be conclusive that the states' power to enter into compacts is in all respects the power of sovereign and independent states. Rhode Island v. Massachusetts, 12 Pet.

657, 725; Poole v. Fleeger, 11 Pet. 186, 209; Story, Commentaries on the Constitution, (5th Ed. 1891) Sections 1402, 1403.

Moreover, in the *Hinderlider* case, the question as to the nature of interstate compacts arose on a point of the appellate jurisdiction of this Court. Its application to the doctrine of immunity is not illuminating. The Board of Tax Appeals showed clearly why the argument based on Congressional consent was inapposite. It said (Rec. f. 74, 75):

"The argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation or is carried on under an interstate compact requiring Congressional consent. The argument is not new. It was considered and rejected in Commissioner v. Harlan, supra, and there is enough in the opinion and briefs in the Ten Eyck case to show that the Federal power over interstate commerce and navigation were not overlooked. * * * To this may be added that there is no reason to regard the revenue act as a means used by Congress to regulate interstate commerce, to control navigation, or as an implied condition of its consent to the interstate compact. * * * It would mean that in making an interstate compact the states would be surrendering the very sovereignty which the Constitution takes for granted and upon which the compact is founded—and this, not directly by an express condition in the resolution of consent, but by an implied relation between the general terms of the consent and the broad terms of the revenue act. Is it to be supposed that in the blanket consent to interstate compacts for crime prevention (USCA, title 18, § 420) lurks a power to tax the state police officers who are employed under the compact?" (Italics ours.)

Perhaps the Commissioner's error arises from his incomplete reading of the reason for the rule of immunity stated in Helvering v. Powers, 293 U. S. 214, 225. In the following

quotation from that case he has omitted the clause we now place in italics (Brief, p. 23):

"That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our Constitutional system." (Italics ours.)

The power to enter into interstate compacts, and the power to enter into fields of interstate commerce not preempted by Congress, are beyond all question within the spheres of action reserved to our State Governments under our Constitutional system. The Government's argument is predicated upon the supposition that immunity exists only where the States are exercising an unlimited sovereignty. But in the American system of dual sovereignty, neither the state nor the federal governments possess unlimited sovereignty.

The Government's contention in this matter of Congressional consent will not stand analysis or application. Thus, if we follow out their theory, only the original thirteen states could be within the doctrine of Collector v. Day—because the consent of Congress was required as a condition precedent to the admission of each of the other states to the Union!

If the Government is correct in its theory, that the consent of Congress has the effect of rendering taxable the subject of a compact, then for all practical purposes the compactual method is useless to the states. This Court is well aware of the wide and salutary use of the compacting power which the states have increasingly employed—interstate bridges and highways, sanitation, conservation, water supply, irrigation, joint police activity, return of parolees.

and many others. The use of compacts in these governmental efforts has been directly encouraged by this Court. We are confident that the Court will not look favorably upon this attempt to paralyze that use.

POINT IV.

Taxation of the Port Authority would be a direct burden on the States of New York and New Jersey.

The States of New York and New Jersey have a very substantial interest in the outcome of this litigation. Federal taxation of the Port Authority would impose a direct monetary burden upon those two States. It would be a burden so real that, unless the States appropriated an amount equivalent to the tax, the Port Authority would ultimately be destroyed. Each of your Amici would be subjected to similar burdens should their bridge, highway and waterway developments be held subject to Federal taxation.

The Port Authority was created and went forward with its financing upon the normal assumption of tax immunity. That this assumption was altogether justified would appear from the recitals of the Legislatures in creating the Port Authority (Rec. f. 331, 332), of Congress in consenting to the Compact (Rec. f. 331), of every court that has passed upon the question during the past decade, and of the eminent

Commissioner v. Ten Eyck, 76 F. (2d) 515, C. C. A. 2nd; Commissioner v. Harlan, 80 F. (2d) 660, C. C. A. 9th; Commissioner v. Gerhardt, 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); Halsey v. Helvering, 75 F. (2d) 234, U. S. Ct. App. D. C.; Jamestown & Newport Ferry Co. v. Commissioner, 41 F. (2d) 920, C. C. A. 1st; Boomer v. Glenn, 21 F. Supp. 766; United States v. King

counsel who have considered the question. The Honorable Charles Evans Hughes, in an opinion written on November 10, 1925, said that this immunity of the Port Authority as a governmental instrumentality was "fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established."

The Government disclosed its ultimate intention to reach the income of the bonds of the Port Authority by expressly denying their immunity in the Stipulation (Rec. f. 311). More forcibly, they now proclaim their intention to reach the revenues of the Port Authority. The Government's Brief, after referring to the gross revenues of the Port Authority, says (p. 47):

"Certainly, to hold the Authority and its employees subject to Federal taxation would not serve to destroy that independence of the States * * *." (Italics ours.)

County, Washington, 281 Fed. 686; Moisseiff v. Commissioner, 21 B. T. A. 515; Carey v. Commissioner, 31 B. T. A. 839; Case v. Commissioner, 34 B. T. A. 1229 (the instant case below); Fitzgerald v. Commissioner, 29 B. T. A. 1113; Modjeski v. Commissioner, 28 B. T. A. 1051; Harlan v. Commissioner, 30 B. T. A. 804; Wait v. Commissioner, 35 B. T. A. 359; Platt v. Commissioner, 35 B. T. A. 472.

¹ In passing upon the nature of a bridge and highway development authority of your Amicus, the State of California, the Supreme Court of that State commented upon and applied the reasoning of this opinion, saying:

[&]quot;By agreement of the two states, the legality of such an organization as the Port Authority, and the validity of its bonds, was submitted to the Honorable Charles Evans Hughes, then practicing law in New York, and now the chief justice of the Supreme Court of the United States. While the opinion of the learned chief justice does not have the force of judicial precedent, it does express the opinion of a very distinguished lawyer and an eminent jurist." In Re California Toll Bridge Authority, 212 Cal. 298, 303.

It is clear, therefore, that the tax upon employees is but the first step in the program of the Treasury Department which the Court is now asked to sanction. In the case of the Port Authority, of course, this is an attempt to tax the revenues of the States themselves. The Government says (Brief, p. 31) that the Port Authority

"revenues belong to it alone, subject to an unexercised power in the States to direct the disposition of surplus revenues."

This is not the fact. Port Authority revenues are expendable only for such purposes as the two States themselves may direct. By statutes concurrently enacted, the States have detailed the exact public purposes to which Port Authority income may be devoted. These revenues are the revenues of the two States—and, as we shall show, the power to direct their disposition has been repeatedly exercised. The Government's brief does not adequately disclose the nature of these revenues. The direction to pledge revenues to secure the bonds issued by the Port Authority is a direction by the two States. The direction to pool these revenues is a direction by the two States, and finally, it is clear that revenues

This is done by Chap. 48, Laws of New York, 1931, and Chap. 5, Laws of New Jersey, 1931, "Regulating the use of revenues received by the Port of New York Authority", (Stip. Ex. E, pp. 282, 306). By Section 2 of this legislation, the States have directed that "Any surplus revenues • • • shall be used for such purposes as may hereafter be directed by the said two states" (See also Stip. Ex. K, Rec. f. 311).

² Section 3, Chapter 37, Laws of New Jersey, 1925; Section 3, Chapter 210, Laws of New York, 1925; Section 3, Chapter 6, Laws of New Jersey, 1926; Section 3, Chapter 761, Laws of New York, 1926; Section 3, Chapter 3, Laws of New Jersey, 1927; Section 3, Chapter 300, Laws of New York, 1927.

³ Section 4, Chapter 4, Laws of New Jersey, 1931; Section 4, Chapter 47, Laws of New York, 1931.

remaining after fulfillment of all other obligations are to be used for such purposes as may be "directed by the two states."

The way in which the States financed these facilities makes it clear that the revenues which the Government is seeking to reach are nothing less than the revenues of the two States. When the States undertook to build the Holland Tunnel, each was faced with the problem of its cost. The Holland Tunnel Compact provided that the cost of the tunnel was to be paid one half by each of the States (Stip. Ex. H, p. 4). The State of New Jersey elected to finance its half of the cost through State bond issues. Such bond issues for \$36, 000,000. were authorized in New Jersey, after State referenda, "for the purpose of paying the cost of extending the system of State highways by the construction of bridges and tunnels for vehicular or other traffic across the Delaware and Hudson rivers." (Stip. Ex. H, pp. 101, 111, 126, Accordingly, New Jersey, New York and Pennsylvania treated the Holland Tunnel and the Camden Bridge as integrated parts of their state highway systems. By the Constitution of New Jersey, the financing Act had to provide the ways and means of liquidating the State's debt. (New Jersey Constitution, Article IV, Section VI, par. 4.) In the case of the Holland Tunnel, this constitutional requirement was to be fulfilled by the collection of tolls. statute provided that revenues "shall be paid into the sinking fund for the payment of interest and for amortizing bonds issued hereunder." (Stip. Ex. H, p. 134.)

On the other hand, New York elected to pay its half of the cost of the Holland Tunnel out of annual state appro-

¹ Chapter 5, Laws of New Jersey, 1931; Chapter 48, Laws of New York, 1931; Stip. Ex. K.

priations (Rec. f. 303), to be reimbursed out of the revenues to be derived from tolls. (There was nothing new in this method of reimbursement-in 1883 New York opened the Brooklyn bridge on a toll basis and continued to operate it on that basis for twenty-eight years. See People v. Kelly, 76 N. Y. 475, 484, 488.) These joint projects of your Amici, the States of New York, New Jersey and Pennsylvania, were planned in line with the fiscal policies of all three States, in the confident belief that the States had the right to charge tolls without subjecting themselves to the burden of Federal taxation, just as freely as the Federal Government charges the users of its postal services. Your Amici, the States of New York and New Jersey, have, ever since that time, assumed not only that they had the sovereign power to create these facilities, not only that they had the power to charge for their use, but also that they had the right to dispose of their revenues, free from Federal tax interference. When the State of New York wished to finance further interstate crossings, it chose to direct that the tolls which it was receiving from the operation of the Holland Tunnel should be turned over to to its other agency, the Port Authority, to be used in the building of the Staten Island Bridges and the George Washington Bridge, in the amount of over \$9,000,000.1 New Jersey advanced an equivalent sum directly from its Treasury.2

¹ Section 1, Chapter 761, Laws of New York, 1926; Section 1, Chapter 300, Laws of New York, 1927; Section 1, Chapter 364, Laws of New York, 1928; Section 1, Chapter 119, Laws of New York, 1929; Stip. Ex. E, pp. 168, 187, 212 and 220.

^{*}Section 1, Chapter 37, Laws of New Jersey, 1925; Section 1, Chapter 6, Laws of New Jersey, 1926; Section 1, Chapter 3, Laws of New Jersey, 1927; Stip. Ex. E, pp. 100, 147, 177.

Again, when in 1931 the States of New York and New Jersey found themselves confronted with the necessity of providing large funds for relief and other emergency expenditures, having found that the Holland Tunnel was a successful project, they exercised their sovereign powers over their own revenues by further directions to their Commissioners. They directed their agency, the Port Authority, to raise \$50,000,000, the cost of the Holland Tunnel, and to pledge the revenues of the Holland Tunnel as security for a bond issue in that amount. They further directed their agency, the Port Authority, upon receipt of these funds to turn the sum of \$25,000,000 into the Treasury of each State. (Chapter 4, Laws of New York, 1931; Stip. Ex. E, pp. 264, 287.)

Under New Jersey statutes, since her half of the revenues were already pledged to the State bond issue, the lien of the bondholders on the new Port Authority Holland Tunnel issue, would have been technically only a second lien on the New Jersey half of the Holland Tunnel revenues. But to meet this situation New Jersey undertook to turn into its own Sinking Funds on the original State bond issue, an amount sufficient in each year, to make good the obligations on those original bonds (Section 6, Chapter 4, Laws of New Jersey, 1931; Stip. Ex. E, p. 269).

Again, when the States of New York and New Jersey determined upon the policy of building an additional vehicular tunnel under the Hudson River (the present Lincoln Tunnel), they directed the pooling of the revenues of all of their joint facilities operated by the Port Authority, including the Holland Tunnel. The States' direction as to the pooling of these revenues from interstate bridges and tunnels now furnishes the basic security for the obligations issued for the

construction of the Lincoln Tunnel. It is obligations of this character, supported by these revenues, which were delivered to the Federal Government in 1933 under the Loan Agreement of March 18, 1925. (Stip. Rec. f. 312, 313.)

Throughout this entire history, not a single Federal or State officer having to do with these transactions, not a single court passing upon the nature of the Port Authority, has ever regarded the revenues from these facilities as anything else but revenues belonging to the two States, to which they are entitled and over which they may and do freely exercise their control in accordance with their own fiscal policies. It is now insisted that these are revenues which the Federal Government may treat as taxable. The Government takes the position that, even if these revenues never passed through the conduit of the Port Authority, but went directly into the Treasuries of the States, they would still be taxable. In short, the Government insists that it may dip into the Treasuries of the States and take out whatever is required for the uses of the Federal Government. This is part and parcel of the same argument which would destroy the power. of each State to deal with its neighbor by compact in a matter of joint concern and would destroy the power of the State to select such agencies and instrumentalities as it requires for its governmental purposes. The Government says (Brief, p. 43):

"But perhaps the most decisive element of the case is the large volume of revenues which would be carved out of the field of Federal revenue sources if the Port Authority and its employees were held exempt from Federal taxation." (Italics ours.)

What the Commissioner is really seeking to do is to carve out of the field of State revenues, new sources of taxation for the Federal Government. The Port Authority's revenues must be deemed to be revenues of the States themselves. Never before in the history of this Court has there been such a flagrant attempt to appropriate the properties of the States.

The Government says (Brief, p. 47) that taxation in these cases "would not serve to destroy that independence of the. States of New York and New Jersey". Are the States to wait until they are on the edge of actual destruction to be entitled to the support of this Court in the protection of their independence? We can find no decision of this Court, old or new, which holds that it is necessary to show that the imposition of the tax will destroy the independence of the States in order to sustain their immunity. It is enough if the tax constitutes an interference with the exercise of the State's governmental functions.

In addition to the bond issues, the directions as to the disposition of revenues, and the outright appropriation of almost three million dollars to the projects of the Port Authority, your Amici, the States of New York and New Jersey, have also advanced over eighteen million dollars in aid of the port construction program of the Port Authority (Rec. f. 310). The States directed that the Port Authority was to return these advances whenever the projects earned a net income over and above all operating expenses and all charges by way of interest and amortization upon outstanding bonds (Rec. f. 64, 310). It was calculated that the return of this eighteen million dollars to the States would begin in about fifteen years. The tax burden which the Government seeks to impose in these cases would obviously increase the operating expenses of the Port Authority and would, therefore, either indefinitely postpone or else forever prevent the return of these advances to the States. Furthermore, the two States have, under Article XV of the Compact, obligated themselves to continue \$100,000 each annually until such time as the Port Authority should become self-sustaining (Rec. f. 325). Although such objective was recently reached, the imposition of a Federal tax burden might necessitate the immediate resumption of these annual payments.

In 1935, the States found themselves pressed with the need for funds with which to meet new burdens, especially the obligation to furnish relief. The insulation of the States' revenues in the hands of the Port Authority, their corporate agency, enabled the States to agree upon a plan of accelerating the return of these advances. Accordingly, in 1935 they availed themselves of the credit of the Port Authority to put into the treasury of New Jersey the sum of \$2,500,000. In 1938, through the same method, over \$2,700,000 will be taken into the treasury of the State of New York. (Chap. 165, Laws of New Jersey, 1935; Chap. 293, Laws of New York, 1935). This means that the States receive the present worth of state income which would ordinarily not be realized for a long period of years. This fiscal program is carried out by the delivery of Port Authority bonds to the State Treasuries. These bonds will ultimately be paid out of the revenues collected from the users of the interstate bridges and tunnels. It is these revenues which the Federal Government now seeks to tax.

In addition, the States of New York and New Jersey hold \$17,444,000 of Port Authority bonds in their own treasuries, part of it in the State Retirement Fund, which is the pension system for State and Municipal employees.

From all of the foregoing facts it is obvious that the burden in these cases would be exactly the same as the burden that was sought to be imposed upon the United States in New York ex rel. Rogers v. Graves, 299 U. S. 401, of which a brief of the Office of the Attorney General of the United States has recently said:

"Therefore, in that case a burden would have been imposed upon the Federal Government had the state tax been allowed, because the source of the general counsel's salary in that case was partially, if not entirely from funds collected by the railroad from the Federal Government as charges for services rendered to it, and from funds which would otherwise inure to the benefit of the Federal Government." (Italics ours.)

The foregoing facts prove to a demonstration the direct burden that would be imposed on the States by the tax urged here by the Federal Government. We have shown that the functions of the Port Authority are clearly governmental.

"If so, its operations are immune from federal taxation and, as a necessary corollary, fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune'. New York ex rel. Rogers v. Graves, 299 U. S. 401." Brush v. Commissioner, 300 U. S. 352, 360.

Conclusion.

Your Amici, the States other than New York, New Jersey and California, have refrained from setting forth special situations in their own States to which the contentions of the Government are equally applicable. To do so would have unduly lengthened this presentation.

The compelling interests which bring the States here include the protection of their sovereignties from Federal

¹ Brief submitted by the Office of the Attorney General of the United States, in *Freedman* v. Commissioner, 92 F. (2d) 150, at page 31 of that Brief.

usurpation; the safeguarding of the method of interstate compacts for the solution of problems transcending state borders; the avoidance of interstate conflict; the protection of the power of the States to control and dispose of their own properties and revenues; the preservation of the financial stake of the States in their port, bridge and highway developments; the preservation of the Authority form of governmental enterprise; and the protection, not only of themselves, but of all their many political subdivisions and municipal corporations, from the burden of Federal taxation.

Respectfully submitted,

JOHN J. BENNETT, JR., Attorney General of the State of New York.

ALBERT A. CARMICHAEL, Attorney General of the State of Alabama.

U. S. WEBB,
Attorney General of the
State of California.

CHARLES J. McLAUGHLIN,
Attorney General of the
State of Connecticut.

P. WARREN GREEN,
Attorney General of the
State of Delaware.

OMER S. JACKSON, Attorney General of the State of Indiana. DAVID WILENTZ,
Attorney General of the
State of New Jersey.

THOMAS P. CHENEY,
Attorney General of the
State of New Hampshire.

A. A. F. SEAWELL, Attorney General of the State of North Carolina.

HERBERT S. DUFFY,
Attorney General of the
State of Ohio.

I. H. VAN WINKLE, Attorney General of the State of Oregon.

CHARLES J. MARGIOTTI,
Attorney General of the
Commonwealth of
Pennsylvania.

GASTON L. PORTERIE, Attorney General of the State of Louisiana.

JOSEPH A. LORET, Special Assistant Attorney General, Louisiana.

PAUL A. DEVER,
Attorney General of the
Commonwealth of
Massachusetts.

RAYMOND W. STARR,
Attorney General of the
State of Michigan.

GREEK L. RICE, Attorney General of the State of Mississippi.

HARRISON J. FREEBOURN, Attorney General of the . State of Montana.

GRAY WASHBURN, Attorney General of the State of Nevada.

HENRY EPSTEIN,
Solicitor General of the
State of New York,
Of Counsel.

Dated: March, 1938.

JOHN P. HARTIGAN, Attorney General of the State of Rhode Island.

JOSEPH CHEZ, Attorney General of the State of Utah.

LAWRENCE C. JONES, Attorney General of the State of Vermont.

ABRAM P. STAPLES,
Attorney General of the
Commonwealth of
Virginia.

G. W. HAMILTON,
Attorney General of the
State of Washington.

ORLAND S. LOOMIS, Attorney General of the State of Wisconsin.

RAY E. LEE, Attorney General of the State of Wyoming.

SEPARATE CONCURRING MEMORANDUM SUBMITTED ON BEHALF OF THE STATE OF CALIFORNIA.

In view of the fact that in California the development of the harbor, port and waterway facilities, particularly in relation to the Bay of San Francisco, is a State function accomplished through *State* revenues and by statutory officers, the State of California is seriously alarmed at the effort of the Commissioner of Internal Revenue to collect a Federal Income Tax from employees of The Port of New York Authority.

As we understand his contention, it is that the employees of the Port Authority are taxable notwithstanding the fact that the Port Authority exists in municipal corporate form as the representative of the States of New York and New Jersey, the theory being that its activities are in nature proprietary and not essentially governmental.

The Board of Tax Appeals in *Platt* v. *Commissioner*, 35 B. T. A. 472 (1937), held immune the salaries of the members of the Board of State Harbor Commissioners of California.

In Commissioner v. Harlan, 80 Fed. (2d) 660, the court granted immunity to the attorney for the Golden Gate Bridge and Highway District.

The Commissioner has apparently for the present acquiesced in these decisions for he did not prosecute appeals therefrom. In fact, the Secretary of the California Board of State Harbor Commissioners received on August 6, 1937 the following letter from the Bureau of Internal Revenue:

"You are advised that after careful consideration it is held that the compensation paid to you by the Board of State Harbor Commissioners of the State of California is immune from Federal Income Taxes." However, and in spite of the present acquiescence on the part of the Bureau of Internal Revenue, we feel that there is no assurance that the Bureau will in the future continue to recognize the fundamental doctrine of reciprocal immunity. The experience of the Port Authority has forced us to expect the possibility of future attacks by the Bureau. It is with this thought that we have joined in this Amici Curiae brief with the hope that this Court, with the position of the State of California along with other states clearly presented for consideration, will definitely settle this fundamental states' rights problem.

I. HARBOR DEVELOPMENT AND OPERATION IN THE STATE OF CALIFORNIA.

The State of California operates the Harbor of San Francisco and San Diego Harbor by and through Boards of State Harbor Commissioners for those harbors respectively, and operates the Eureka Harbor by and through the Department of Public Works of the State of California.

California is particularly concerned about the case at bar because the question at issue is very similar to that which was involved in attempts which have heretofore been made by the Commissioner of Internal Revenue of the United States to collect income taxes from members of the Board of State Harbor Commissioners for San Francisco Harbor and the employees of said Board.

Said Board of State Harbor Commissioners for San Francisco Harbor and its predecessors have been since about the year 1863 an agency of said State of California created by law and vested by law with jurisdiction and control over waterfront property owned by said state and located in the City and County of San Francisco and over that portion of

the Bay of San Francisco within an area defined by law and generally lying along the easterly and northerly lines of said city and county, and the improvements, rights, privileges, easements and appurtenances connected therewith, said jurisdiction and control being for the purpose of maintaining and developing San Francisco Harbor and maintaining, developing and operating terminal facilities thereof.

The duties of said Board are those prescribed by Sections 1690 to 3231 of Part I, Division VI of the Harbors and Navigation Code of said State.

The members of said Board of State Harbor Commissioners are appointed by the Governor of the State of California and serve during his pleasure, and all the powers and duties of said Board are essentially governmental in character and such as are usually and traditionally a part of governmental functioning. The San Francisco Harbor has been developed and all of its facilities supplied and constructed under the present Board and its predecessors.

II. GOVERNMENTAL NECESSITY FOR THE CREATION OF THE BOARD OF STATE HARBOR COMMISSIONS FOR SAN FRAN-CISCO HARBOR.

The Board of State Harbor Commissioners for San Francisco Harbor exercises jurisdiction and control over a strip of waterfront land in the City and County of San Francisco bordering on tidewater in San Francisco Bay and of a certain part of the bay itself. Both the lands bordering the water and the adjacent lands submerged by the waters of the bay are integral parts of the harbor and their management and control by a single agency are necessary for the efficient and safe transportation of persons and property in

and out of the City and County of San Francisco and the territory of the State tributary to said city and harbor.

These lands along the waterfront, from the time of the admission of the State into the Union, have been sovereign lands of the State. The efficient operation of the harbor requires control over all of these lands under one agency in order that all of the facilities of the harbor may be integrated and the different activities thereof harmonized. Without such integration and unity of control the waterfront lands and harbor facilities could not be utilized so as to furnish the best possible service to the public at a fair price: Such unified control is also necessary in order that adequate facilities to accommodate the commerce of the port may be supplied when and as needed. The history of the port has shown the necessity for state ownership and control and for the furnishing of credit by the state in order to properly develop the harbor.

Public control of the harbor is also required in order that the waterfront shall be properly policed and that regulations concerning the movement of vessels to and from piers and slips and along the waterfront shall be properly regulated. Such public control is also required in order that safe and proper landings may be constructed and that rules shall be made and enforced regarding the landing of goods and the conditions under which they may remain upon wharves.

In this connection it may be further stated that the efficient operation of the harbor has required the construction and maintenance of a street paralleling the bay along the entire waterfront and located on lands belonging to the state. Only a public agency would have the necessary power, including the power of eminent domain, to open and maintain such a street and regulate the traffic thereon.

III. THE BOARD OF STATE HARBOR COMMISSIONERS IS AN IN-STRUMENTALITY OF THE STATE OF CALIFORNIA ENGAGED IN THE PERFORMANCE OF A USUAL AND TRADITIONAL GOVERNMENTAL FUNCTION.

That the Board of State Harbor Commissioners is an instrumentality of the State of California is evident from the fact that the state has not seen fit to create any intervening political subdivision, authority or corporate body through which to effect its purposes with respect to San Francisco Harbor. The Poard of State Harbor Commissioners is the State of California itself, operating through the state's directly appointed officers. Indicia of the status of the Board as a state instrumentality are the following:

The Board is required to render a biennial report to the Governor of the State; it has the power of appointment of officers and employees of the state; it has possession and control over the area of the port of San Francisco, owned by the state; officers and employees of the Board are members of the State Civil Service System and of the Employees' Retirement System of the State of California; the revenues of the Board must be deposited monthly in the state treasury and are subject to budgetary laws, and must be used pursuant to legislative appropriation; contracts of the Board must be made in a manner prescribed by law; failure to comply with the rules of the Board is a misdemeanor; bonded indebtedness for the work of the Board is incurred through general obligation bonds of the State of California (Harbors and Navigation Code, Chapter 368, California Statutes 1937).

That the Board is a state instrumentality engaged in performing governmental functions has been recognized in United States v. State of California, 297 U. S. 175, 184; Sherman v. United States, 282 U. S. 25, 29. In Taylor v. Spear, 196 Cal. 709, 715, the court referred to the Board as "one of the state agencies of the State of California". See also Denning v. State, 123 Cal. 316, 321, on the same point.

It was specifically held in *Platt* v. *Commissioner*, 35 B. T. A. 472 (1937) that the Board of State Harbor Commissioners of California is engaged in the performance of a usual governmental function and that the salaries of the members of the Board and its employees are immune from federal taxation.

A partial enumeration of the powers of a governmental nature exercised by the Board are as follows: It has powers relating to landing and loading of merchandise; constructing wharves and improvements; making repairs; assigning berths and slips to vessels; building a sea wall and dredging; providing harbor police and making quarantine regulations; extending streets and establishing thoroughfares; exercising the power of eminent domain; providing a location for a public market; locating and constructing public dry docks; locating docks for federal use; operating a State Belt Railroad; providing a location for air ports; contracting for and using fire boats; removing obstructions to commerce and navigation; mapping waterfront changes; making rules and regulations for the commerce of the port.

In exercising its governmental activities the Board has installed in excess of fifty navigation signals, including lights, sirens, and bells, while the Federal Government has installed only one, within the pier head line. The Board has not only maintained a thoroughfare along the whole waterfront called the Embarcadero but has constructed a tunnel along and under the same for the improvement of traffic in

front of the ferry depot, and has under statutory provision purchased property for the straightening of the lines of said street.

That the Board is not acting in a proprietary capacity is shown by the statutory requirement (Section 3084, Harbors and Navigation Code) that a greater amount of money shall not, in the main, be collected pursuant to the terms of said Code than is necessary to enable the Board of State Harbor Commissioners to perform the duties required, exercise its authorized powers, and provide for interest and redemption requirements for bonds issued for any of the harbor purposes. This statutory policy has been followed continuously by the Board.

This statutory restriction upon revenues is clearly designed in the interest of the public for the establishment of port charges as low as the operation of the harbor will permit and, in fact, has resulted in the establishment at said Harbor of San Francisco of exceedingly low port charges.

IV. GOVERNMENTS HAVE UNIVERSALLY EXERCISED THE FUNCTION OF DEVELOPING AND OPERATING THEIR PORTS AND HARBORS.

There is no need to supplement the arguments in the briefs submitted by Respondents and Amici Curiae as to the necessity for governmental control of harbors. Neither would it serve any purpose to add to what the Circuit Court of Appeals said in Commissioner v. Ten Eyck, 76 Fed. (2d) 515, 517, 518, as to the history of port development and operation in this and other countries. We simply state that we concur in these arguments and rely upon them.

We conclude that according to constitutional principles long established and many times reaffirmed, The Port of New York Authority and its employees are engaged in essential, usual and traditional governmental functions of the States of New York and New Jersey and are immune from federal taxation, and that in accordance with the same principles, the State of California and its employees, as owner and operator of the Harbor of San Francisco and of all of the facilities of said harbor are engaged in essential, usual and traditional governmental functions and are immune from federal taxation.

Respectfully submitted,

U. S. Webb, Attorney General of the State of California.

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October Term, 1937.

Nos. 779, 780, 781.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

PHILIP L. GERHARDT.

. Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

V.

BILLINGS WILSON,

Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

V

JOHN J. MULCAHY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES.

> Markell C. Baer, Oakland, California,

Attorney for the American Association of Port Authorities.

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Supreme Court of the United States

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner.

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PHILIP L. GERHARDT,

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

BILLINGS WILSON,

Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner.

v.

JOHN J. MULCAHY,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Comes now the American Association of Port Authorities, by its counsel, Markell C. Baer, and petitions this Court for leave to appear herein as Amicus Curiae and to file the subjoined brief in behalf of the position of the Respondents in the above cases, and in support thereof respectfully shows:

- 1. Your Petitioner is an organization, the membership of which includes agencies and instrumentalities of the States of the United States, and of their municipalities, engaged in the work of the development and operation of their respective ports and harbors.
- 2. The issue presented is whether a state agency engaged in the work of port and harbor development is engaged in an essential governmental function and is immune from Federal taxation. Since your Petitioner is an Association composed of such agencies, and since any decision with relation to The Port of New York Authority, one of its members, may well be determinative of the tax status of many of its members, the interest of your Petitioner in the outcome of these cases is patent. That interest is more fully set forth in the Statement in the subjoined brief, which Statement this Honorable Court permitting, is incorporated herein by reference.

Wherefore, the undersigned, on behalf of the American Association of Port Authorities, prays leave to appear herein as Amicus Curiae and to file the subjoined brief in behalf of the position of the Respondents in the above cases.

MARKELL C. BAER,
Attorney for the American
Association of Port Authorities.

Dated: March, 1938.

The undersigned, attorneys, respectively, for the Commissioner of Internal Revenue and for the Respondents herein, raise no objection to the granting of leave to the American Association of Port Authorities to appear and file a brief herein as Amicus Curiae.

Solicitor General of the United States.

Attorney for Respondents.

Supreme Court of the United States

October Term, 1937.

Nos. 779, 780, 781.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

PHILIP L. GERHARDT,

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

0.

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

JOHN J. MULCAHY,

Respondent.

BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES, AS AMICUS CURIAE.

Statement.

The American Association of Port Authorities is, by its Charter, an association composed "of legally established port organizations and state harbor boards, having jurisdiction over one or more ports".

American ports represented in the Association include among others:

Port of Albany Port of New York Port of Boston Port of Oakland Port of Chicago Port of Olympia Port of Coos Bay Port of Oswego Port of Corpus Christi Port of Philadelphia Port of Galveston Port of Portland (Me.) Port of Honolulu Port of Portland (Ore.) Port of Houston Port of Providence Port of Lake Charles Port of San Francisco Port of Long Beach Port of Savannah Port of Los Angeles Port of Seattle Port of Milwaukee Port of Stockton Port of Mobile Port of Tacoma Port of Newark Port of Trenton Port of New Orleans Port of Wilmington

In addition, there are the following state organizations:

California Board of State Harbor Commissioners, Massachusetts Department of Public Works, New Jersey State Board of Commerce and Navigation, and South Jersey Port Commission.

The ports listed above have a great stake in the outcome of these appeals. If the Federal power to regulate interstate or foreign commerce, or the constitutional requirement of Federal consent to a compact, be held to give rise to the power to levy taxes on port facilities—contentions already repudiated by every court before which they have been raised—then no port in the country may be free from such a Federal tax on its revenues, its bonds and the salaries of its employees.

The ports of the United States have, for a long period of time, relied upon many decisions of the Board of Tax Appeals and the Circuit Courts of Appeals, which have unanimously held that such activities are immune. Prior to the instant cases, the Commissioner of Internal Revenue has never taken appeals to this Court from those decisions. The ports have, therefore, arranged their budgets, issued bonds and adjusted salaries on the basis of a tax immune status, which they have justifiably assumed as a result of those decisions. Of the opinion of Honorable Charles Evans Hughes, dated November 10, 1925, holding the bonds of The Port of New York Authority immune from Federal taxation, the Supreme Court of California has said:

"While the opinion of the learned chief justice does not have the force of judicial precedent, it does express the opinion of a very distinguished lawyer and an eminent jurist." In Re California Toll Bridge Authority, 212 Cal. 298, 304.

The attempt in these cases to overrule that body of precedent seriously threatens the free and independent right of coastal States and the States of the Great Lakes to develop their ports and harbors, through such instrumentalities as The Port of New York Authority. To anyone at all familiar with the organization of port bodies, it is obvious that ordinary corporate income tax on their net revenues would cripple and bankrupt them. Created on the basis of government service in the development of ports, the impost of Federal taxes, even if they were able to raise it, would frustrate their entire public purpose.

The Association includes four port bodies which have successfully defended their constitutional immunity before the Board of Tax Appeals and the Circuit Courts of Appeals:

The Port of New York Authority, the Albany Port District Commission, the Port of Houston and the California Board of State Harbor Commissioners.

Of these, The Port of New York Authority has, on three occasions, been upheld by the Board of Tax Appeals: Moisseiff v. Commissioner, 21 B. T. A. 515 (1930); Carey v. Commissioner, 31 B. T. A. 839 (1934); and the instant cases below (1936). The present cases were unanimously affirmed by the Circuit Court of Appeals on the authority of the decisions of this Court in New York ex rel. Rogers v. Graves, 299 U. S. 401; Brush v. Commissioner, 300 U. S. 352; and its own prior decision in Commissioner v. Ten Eyck, 76 F. (2d) 515.

The Albany Port District Commissioner has been held immune in Fitzgerald v. Commissioner, 29 B. T. A. 1113 (1934), and Commissioner v. Ten Eyck, 76 F. (2d) 515 (1935).

The Port of Houston authority was held immune in Wait v. Commissioner, 35 B. T. A. 359 (1937); the California Board of State Harbor Commissioners in Platt v. Commissioner, 35 B. T. A. 472 (1937). Peculiarly enough, in the case of the California Board of State Harbor Commissioners, the Commissioner has accepted the views of the Board. On August 6, 1937, in a letter addressed to the Secretary of the California Board, the Bureau of Internal Revenue declared:

"You are advised that after careful consideration it is held that the compensation paid to you by the Board of State Harbor Commissioners of the State of California is immune from Federal Income tax."

POINT I.

PORT AND HARBOR DEVELOPMENT IS AN ESSENTIAL GOV-ERNMENTAL FUNCTION TRADITIONALLY EXERCISED BY GOV-ERNMENTAL AGENCIES.

We can conceive of no better evidence of a governmental function than the fact that it has always been, and is today, carried on by governmental agencies throughout the world.

The development and control of ports and harbors has historically been the concern of government. This traditional development of ports by governments from the earliest times is set forth in Point IV of Respondents' Brief and need not be repeated here. The Solicitor General cannot but recognize it. He says of the Port Authority:

"We readily agree that its activities in building bridges and in developing the port are appropriate fields for state action and are sanctioned by long usage." (Petitioner's Brief, p. 63; italics ours).

The function is not only historically governmental—it is universally carried out by governments throughout the world today. Before we review the universal practice of governments in developing their ports, a word is in order as to the kind of operations required in the development of a modern port. At the Port of New York, for instance, the States have revolutionized the freight handling methods and terminal system, have defended the interests of the Port and its flow of commerce from both domestic and foreign attack, and have provided great highway arteries over and under its encircling waters to speed the flow of its commerce. This is the same type of work that the Federal Government itself

found necessary to do in the Panama Canal Zone, where it operates and controls directly all the piers, wharves, warehouses and storage facilities at both Atlantic and Pacific termini of the Canal.

The authorities on the subject, going back to the Seventeenth Century, emphasize that the provision of adequate terminal facilities is of the essence of this governmental duty of developing ports. Thus, Lord Hale (1609-1676), writing. "Concerninge the Ports, Theyre Natures and Originalls", says:

"A port is an agregate thinge, partly naturall, vizt. the contiguity of the sea or some creeke thereof, or some nauigable river, wherby vessells may have accesse to unlade, and partly artificiall, vizt. keyes and landinge places and howses and receptacles for mariners and merchandizes, as the port of London, of Douer, of Southhampton, Bristoll, etc., wherein though the denominatione bee from the town or city, which is as it were caput portus, yet the port itself is a thinge of larger extent, and takes in sometymes a greate tract of water or nauigable rivers; as the port of London includes all the river Thames down below Grauesend, the port of Bristoll includes the channel of Seuerne vp to Gloucester and down to Kingrode and Hungrode."

At a far more recent date (1935), the Circuit Court of Appeals, for the Second Circuit, has similarly regarded port requirements, when it said (Commissioner v. Ten Eyck, 76 F. (2d) 515, 517):

"The essence of port and harbor development is to provide adequate terminal facilities."

^{1&}quot;A Narrative Legall and Historicall Touchynge the Customes", as quoted in Stuart A. Moore's "History of the Foreshore and the Laws Relating Thereto", at page 319.

A survey of the conduct of port activities in foreign countries and throughout the United States reveals that direct agencies of government, similar to The Port of New York Authority, have been universally created for the purpose of developing and supervising ports; that in nearly all such instances, they are constituted similarly to The Port of New York Authority; and that they similarly own or operate large sections of the terminal and highway facilities of the harbor area.

The following factual review of governmental activity in port development is suggested by the learned opinion of the Circuit Court of Appeals, for the Second Circuit, in Commissioner v. Ten Eyck, 76 F. (2d) 515.

London and Other English Ports.

From very early times governmental agencies have owned and operated wharves and other terminal facilities in the area which now comprises the Port of London. This governmental control continued for some centuries. However, during the Nineteenth Century the great English dock companies had secured some measure of private control of port facilities under Charters of Parliament. But the abuses of this private control were so many and manifest that it became imperative for the government to reorganize the port facilities and once again take over directly the duties which they had historically exercised. First, there was appointed a Royal Commission to investigate the conditions existing in the Port of London, just as did New York and New Jersey in 1917 in dealing with their problem of organization of the Port of New York.

¹ See The Port of London, by D. J. Owen (1927) at page 22.

In June 1902 the Royal Commission presented its comprehensive report, containing recommendations for the creation of a new governmental authority and for transferring thereto the properties and obligations of all the dock companies and of all other organizations and companies, both public and private, controlling wharves, terminals or other facilities of the London port district.

In the concluding paragraph of its Report the Commission recognized the public importance and necessity of unified governmental control over all port facilities.

"The deficiencies of London as a Port, to which our attention has been called, are not due to any physical circumstances, but to causes which may easily be removed by a better organisation of administrative and financial powers. The great increase in the size and draught of ocean-going ships has made extensive works necessary both in the river and in the docks, but the dispersion of powers among several authorities and companies has prevented any systematic execution of adequate improvements. Hence the Port has for a time failed to keep pace with the developments of modern population and commerce, and has shown signs of losing that position relatively to other ports, British and foreign, which it has held for so long. The shortcomings of the past cannot be remedied without considerable outlay. We are, however, convinced that if in this great national concern, energy and courage be shown, there is no reason to fear that the welfare of the Port of London will be permanently impaired." "The Port of London" by D. J. Owen, supra at page 23.

The entrusting of regulation, control and operation of all of the terminal facilities of a port to a centralized public agency was not unusual in England at the time the recommendations of the Royal Commission were submitted to Parliament. Control of waterfront facilities of the Port of Liverpool had been entrusted to a governmental agency, the Trus-

tees of the Liverpool Docks in 1811. That board continued in existence as a combined regulating, owning and operating agency until 1857. The Mersey Docks and Harbor Board, constituted by an Act of Parliament in 1857 took over the entire control of the port with powers in many respects greater than those of The Port of New York Authority or the Port of London Authority.¹

Similar control of the facilities of the Port of Glasgow has existed since 1858 under the Trustees of the Clyde Navigation, although the origin of this governmental agency and of its powers with respect to harbor facilities at Glasgow dates back to 1759.² The Tyne Improvement Commission derives its powers from legislation adopted by Parliament in 1850-1861. The present by-laws of the Commission were adopted in 1884.³

All of the dock facilities of the Port of Bristol had been for a long period of time owned and controlled by the municipality, and Leith, Cardiff, Dundee and Sunderland, to mention only a few of the other ports of England and Scotland were similarly under governmental operation and control over a long period of time.

¹ See The Mersey Docks and Harbour Act, 1857—Act. 20 & 21 Vict. ch. 162; also The Mersey Dock Acts Consolidation Act, 1858—Act 21 & 22 Vict. ch. 92. See "The Port of Liverpool", published by the Mersey Docks & Harbour Board (1923) excerpts reprinted in "English Port Facilities" by F. T. Chambers—U. S. Government Printing Office 1919, Appendix 5.

[&]quot;"English Port Facilities," supra, Appendix 24.

^{3 &}quot;English Port Facilities," supra, Appendix 28.

[&]quot;English Port Facilities," supra, page 59.

A Bill for creation of the new Port of London Authority was presented to Parliament in 1903 but it was not until 1908 that the enabling legislation was finally enacted. With the creation of the Authority, unified governmental control of all port facilities in the Port of London became an accomplished fact.¹

The powers of the Port of London Authority were consolidated, amended and extended by the Port of London Consolidation Act of 1920. The Port of London Authority is a self-liquidating public corporation which owns and operates all of the port facilities in a large geographical district. It is empowered to make regulations with respect to practically all matters concerning navigation and shipping in that district other than customs and excise regulations; to charge river duties, tonnage charges and other tolls and make charges on the use of its facilities. The Port of London Authority maintains its own police force for the enforcement of its regulations and its own operating force in connection with many of its facilities. It is a creature of public necessity and clearly an instrumentality of government.

The name "Authority" found its first use in the title of the Port of London Authority. It came about as Lloyd George's suggestion in the search for a better name than "Board" or "Commission", and arose from the frequent use of the phrase "Authority is given" at the beginning of each grant of power in the Act. Your Amici, the American Association of Port Authorities, has taken the same name as descriptive of all agencies dealing with port and harbor development.

Hamburg and Northern European Ports.

As the Circuit Court of Appeals pointed out in the Ten Eyck case (76 F. [2d] 515, 517), the Port of Hamburg like other northern European ports is operated under the supervision of a government-controlled committee for trade, shipping and industry. (The Court cited "The Port of Hamburg", by L. Wendemuth and W. Böttcher, p. 180). This government body is operated usually at a loss, or at best, earns only sufficient operating revenues to meet the cost of its facilities. The committee controls and regulates the dock facilities and provides for warehouses, ferries and piers. The committee is operated on the same basis as all other governmental agencies of the Reich.

A similar type of port control and operation of facilities is found not only in the other ports of the Hanseatic League but throughout Northern Europe. Antwerp, Amsterdam, Rotterdam, Bremen, Copenhagen (except for the privately owned free port), Swedish, Finnish and Norwegian ports, as well as the free city of Danzig, possess similar port organizations. They are controlled, in most cases, by the municipality, although in all cases there is a direct responsibility to the Central Government, so that in these instances the agency must be regarded not merely as a municipal department but as an independent governmental agency in and of itself. Thus, we find that in Rotterdam, where the municipality is the proprietor of the basins and the adjoining waterfront and provides for the construction of port basins, quays and roadways, these services have become centralized in a municipal agency called "Havenbedrijf der Gemeente Rotterdam" which administers the harbor service, pilotage in the harbor, the leasing of grounds owned by the municipality,

the operating of the Handelsinrichtingen (a quay and warehouse area operated by the municipality itself), as well as the dry docks and ferries in the port.

In Antwerp many quays along the shore, and the barge docks south of the city were constructed by the state but are operated and regulated by the municipal port agency for the joint account of the city and the state pursuant to special agreement. The city also controls and regulates dock facilities in other portions of the harbor which it has itself built.²

French and Southern European Ports.

The organization of French ports follows a standardized pattern developed by the Central Government and given its most recent sanction in legislation passed in 1920. The guiding principles of port development in that country are summarized in the preface to the Annual Report of the Port Autonome du Havre for 1928. It is there stated at page 5:

"Since January 1, 1925 the Port of Havre has been an independent autonomy administered under the provisions of the Law of June 12, 1920.

The administration of the port is carried on by a

Council comprised of twenty-one members:

The Council of Administration passes definitely on everything which concerns the works, the commerce and the development of the port except for those works involving essential changes or modifications in the facili-

¹ See "The Port of Rotterdam, Its Growth, Development of Traffic and Facilities", published by the Municipality of Rotterdam (p. 29).

² "Port of Antwerp", a pamphlet published by the Corporation of the City of Antwerp, 1929 (p. 31).

ties or means of access to the port which are carried on with the assistance of the state. The Council has, then, a large part of the functions formerly devolving on the Minister of Public Works, decentralization of which permits acceleration of execution of a great number of projects and assures speedy execution of harbor equipment and repairs in character both large and small. The fostering of new public works is not essentially modified by this change of administration. The state cooperates with the Port Autonomy in these works up to half the total cost thereof.

In the same way that the Republic of France has turned over to the Port Autonomy these port facilities: quays, locks, storehouses, freight handling machinery, etc., constructed by it, the Chamber of Commerce of Havre has given over to the Port Autonomy all of the facilities that it possessed and operated before: sheds, cranes, fire boats, sea walls, etc. The Port Autonomy has thus the control of all of the maritime and land installations of the port."

In Havre substantially all of the waterfront facilities are owned by the Port Autonomy. In Marseilles, although the port is also controlled by a Port Autonomy, there exists a large private dock development, Compagnie des Docks et Entrepots. In each of these ports the Port Autonomies fix rates and charges, and coordinate the work of the whole port area, including the privately operated facilities, as well as those directly operated by them.

The port organization in Bordeaux, and other French ports, is the same as that of Havre and Marseilles.

The foregoing review of the governmental character of the leading port organizations of the Continent demonstrates that in the regulation and development of their ports



¹ Cunningham's "Port Administration and Operation", 1925, pages 26 and 27.

and harbors, European governments treat these functions as essentially governmental in character.

The Harbor Commissions of Montreal and of Other British Dominion Ports.

The governmental agency in charge of the operation and development of the Port of Montreal is the Harbor Commissioners of Montreal.¹

The first attempt to improve the Port of Montreal was made in 1830, but the Board of Harbour Commissioners, as it is now constituted, did not take form until August of 1850. In that year the St. Lawrence Ship Channel was placed under the jurisdiction of the Harbour Commissioners of Montreal, for the purpose of undertaking dredging operations to widen and deepen the channel. The Commission was reimbursed for the cost of this work by revenues from tolls charged for use of the channel. The duty of carrying out construction of wharves and other improvements in the port was entrusted to the Harbour Commissioners thereafter from time to time when it was found that private capital could not be persuaded to bear the cost of construction of modern facilities in a port which is ice bound five months of the year.

That this intensive governmental development of the Port of Montreal was necessary and is desirable is attested by

¹ See Montreal Harbour Commissioners Act, 1894—Act 57-58, Victoria, chap. 48; See also 8-9 Edward VII, chap. 24, Statutes of Canada, 1909.

nearly all of the authorities on the subject. In his volume entitled "Port Development", Dr. Roy S. MacElwee of Columbia University, says (page 52):

"Probably the most thoroughly organised North American port is that of Montreal. This is a public trust with far-reaching rights. Unless a port authority owns the port and has the authority, it cannot accomplish very much. But at Montreal, the moment one steps through the gate into the port area he is under a new government. The port authority maintains its own police force and can make arrests. It can expropriate property required for waterfront developments. It makes its own rates, makes its own laws, and borrows its own money. It owns, operates and controls to the fullest possible extent. It has been remarkably successful."

The organization and control of harbor facilities in Halifax, Vancouver, and other ports of the Dominion of Canada, is practically identical with that of Montreal. The same type of organization on the model either of the Mersey Docks and Improvement Board or of the Board of Harbour Commissioners of Montreal has been adopted for the Australian ports and for those of New Zealand, India, the Federated Malay states and other British Dominions and possessions throughout the world.

At Singapore the Harbour Board controls all the public wharves and dry-docks and owns an estate comprising over 960 acres of land, parts of which it has leased to private industries conducting commercial operations in the port. The Board has its own police force and fire brigade, lights the port area throughout and controls all traffic, does all road-making and repairing, and undertakes the sanitation of the entire port area.

State Port Commissions and Authorities in the United States.

The Port of New York Authority, the Albany Port District Commission and the California Board of State Harbor Commissioners are outstanding examples of the degree of governmental control and organization which it has been found necessary to exercise in the development of our American port and harbor areas. The record in these cases and the Brief submitted on behalf of the Respondents make it unnecessary for your Amicus to refer further to the actions taken by New York and New Jersey in the development of New York harbor. In addition to the activity of the States, the City of New York directly owns the entire New York waterfront. Through its Dock Department it has constructed, and in many cases operates, the docks and piers along the New York side of the harbor waters. Williams v. Mayor, 105 N. Y. 419, 436; Matter of Mayor, 135 N. Y. 253, The governmental organization of the Port of Albany is adequately set forth in the Circuit Court of Appeals' opinion in the Ten Eyck case (76 F. (2d) 515).

Similar circumstances have led to the creation of direct agencies of government to administer the affairs of many other ports throughout the United States. When, in 1931, the Commonwealth of Pennsylvania and the State of New Jersey entered into a compact or agreement creating the Delaware River Joint Commission, they authorized it to promote and regulate the port facilities of Philadelphia and Camden and to develop the Delaware River as a highway of commerce between those cities and the sea. Long prior thereto, the City of Philadelphia had gone forward with the development of its own waterfront.

The State of Louisiana has entrusted the control and development of all of the port facilities of New Orleans, including the canal system and the extensive public warehouse systems in that city, to the Board of Commissioners of the Port of New Orleans. Similarly, The Alabama State Docks Commission is "a state agency authorized to conduct 'the operation of all harbors and seaports within the state' and to 'adopt rules * * * for the purpose of regulating, controlling and conducting said operation' and with power 'to fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act'." Clyde Mallory Lines v. Alabama, 296 U. S. 261, 262.

In Houston, Texas, similar functions are exercised by the Harris County Houston Ship Channel Navigation District. The nature of this body as a governmental agency of the State of Texas engaged in immura governmental functions was upheld in Wait v. Commissioner, 35 B. T. A. 359.

Galveston, Beaumont, Corpus Christi and other Texas ports possess similar port and harbor authorities:

In California, title to and control of the waterfront of San Francisco is held directly by the State, and the California Board of State Harbor Commissioners administers the affairs of that port. This Court is familiar with the activities of the California State Board of Harbor Commissioners through its consideration of the cases of Sherman v. United States, 282 U. S. 25, 29 and United States v. California, 297 U. S. 175. The constitutional immunity of that body was upheld in Platt v. Commissioner, 35 B. T. A. 472, and the immunity of the development of that port's highways and bridges through the Golden Gate Bridge and Highway District in Commissioner v. Harlan, 80 F. (2d)

660. A separate California state board exercises joint authority with the Port Commission of San Diego in administering the affairs of that port.

Direction of the facilities of the port of Portland, Oregon, is divided between the Portland Commission of Public Docks and the Port of Portland Commission, the first being a department of the City government and the second a direct agency of the State. Port Commissions or authorities have been created and function in Boston, Massachusetts; Wilmington, Delaware; Charleston, South Carolina; Savannah, Georgia; Oakland, Long Beach, Stockton and Los Angeles, California; Seattle and Olympia, Washington; and in the Great Lakes ports of Milwaukee and Chicago, as well as the ports of the State of Michigan. The Port of Milwaukee has entrusted to it the development and regulation of its airport as well as of the waterfront.

While the development of ports and harbors has been a recognized governmental function from the earliest days of history and was such, of course, at the time of the adoption of the Constitution, the statement of this court in *Brush* v. *Commissioner*, 300 U. S. 352, 371, that,

"Governmental functions are not to be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning."

suggests the recent and necessary development of airports by the States and municipal authorities. In this field, governments have been forced to accommodate themselves to the necessities of the day. See Wichita v. Clapp, 263 Pac. (Kan.) 12; Dysart v. St. Louis, 11 S. W. (2d) 1045; Kremwinkle v. Los Angeles, 4 Cal. (2d) 611; Hesse v. Rath, 249 N. Y. 436. Thus, the Board of Port Commissioners of the Port of Oak-

land has also devoted much of their effort toward the establishment of the Oakland Municipal Airport. They feel that it is an integral part of port development in that it serves the needs of commerce and shipping by air, which, in turn, is coordinated with the waterway, highway and other facilities of the port.

Federal Port Organizations.

The Federal Government has recognized the need of direct governmental control and operation of port facilities in the Panama Canal Zone and operates and controls directly all of the piers, wharves, warehouses and storage facilities both at the Atlantic and Pacific termini of the Canal. (See New York ex rel. Rogers v. Graves, 299 U. S. 401.)

The largest port under the direct control and jurisdiction of the Federal government is, however, the Port of Honolulu in the Territory of Hawaii. The regulation and control of the facilities of this port, as of all other ports and harbors within the territory of Hawaii, is entrusted to a body called the Board of Harbor Commissioners of the Territory of Hawaii, appointed by the Governor of the Territory. This Board owns extensive wharves and other terminal facilities in the harbor of Honolulu and other Hawaiian ports and makes regulations concerning all matters of navigation connected with those ports.

The Territorial Board of Harbor Commissioners has been authorized to collect port dues as well as charges for the use of harbor facilities and has come to be a fully self-liquidating public agency. (See Joint Resolution No. 5, Territorial Legislature of Hawaii, 1929.)

POINT II.

THE NATURE OF PORT DEVELOPMENT IS SUCH THAT IT CAN BE ACCOMPLISHED ONLY BY GOVERNMENTAL ACTION.

We have shown that port development is a function which has always been within the province of government and which today is universally exercised by governmental agencies. Moreover it is a function which imperatively requires the functioning of a governmental agency for its adequate and effective execution.

The problem of port development today is one of coordinating waterway, shipping, highway, terminal and railroad facilities into a workable whole which allows the flow of freight and passengers through the gateway known as the Port. To attempt, as does the petitioner in his brief, to characterize port development by the states as simply a "transportation business," and therefore taxable, is simply meaningless. It misses the whole purpose of port development. Countless recognized and accepted functions of government may be said to concern "transportation."

The growth of the present day Port has been described as follows:

"At the beginning of the nineteenth century the American-port was simply a harbor, a meeting place of overseas and coastwise sailing ships. Its only lines of communication were by water. It existed in an Eden of shipwrights, chandlers, sailmakers, barnacles, and bluff candor. Its hinterland was in its own back yard. It was innocent of high-pressure competition until the Erie Canal, wriggling its seven-million-dollar way from Lake Erie to the Hudson in 1825, tempted New York

^{1&}quot;Eight U. S. Ports", Fortune, September 1937, page 92.

with the apple of the interior, offering it the concentrated tonnage of the opening West. This tonnage attracted the ships of the world, created a reciprocal market, gave rise to a superstructure of terminals, in-

surance companies, and export houses. * * *

"This thrust of commerce from the interior of the land to the sea marked the beginning of a remarkable change in the American port. Of course it was still a harbor. It still had its natural advantages or drawbacks in relation to other harbors, in terms of location, climate, depth, and tidal variations. But with the development of nationwide commerce it began to depend more and more for its prosperity upon competitive land forces-in a word, the railroads. These became the arteries that pumped its lifeblood to and from its hinterland. So that today the port has become a land phenomenon. It may even be manmade, by means of channels. And the main factors that control its destiny are railroad transportation rates, terminal charges, local industries, flexibility of operation, and availability of shipping services."

What can happen when government fails to resolve conflicting interests and coordinate transportation, terminals, highways and harbor service in a port area, is illustrated by conditions in the Port of New York in 1916. (See New York Harbor Case, 47 I. C. C. 643, 732, 733). The flow of goods becomes irregular, terminal costs rise, and traffic congestion piles up a heavy burden of wasteful expense. These drags on commerce sharply raise the cost of living, not only in the port district, but also in the country at large. In an extreme case, as happened in New York during the World War, governmental neglect can bring about such a breakdown in transport as to prevent the clearance of war materials. (Record, Stipulation Exhibit B, p. 35.) There was a similar failure of port facilities during the World War, at all of the ports on the Atlantic coast, but it was

especially serious at the Port of New York because of the vast amount of supplies it was called upon to handle.

The effect of the lack of coordination of port facilities upon the standard of living is described by Dr. Roy S. MacElwee, in "Ports and Terminal Facilities" (1918), as follows (pp. 2, 3):

"From the purely local viewpoint each consumer is concerned with this question. If the public carrier, the railway or ship company, is not particularly interested in the reduction of the 'frais parasites' of transportation at the terminals, which adds its big bit to the high cost of living, the nation is. * * * The long years of public indifference to the drag on its resources by unnecessary expenses of transportation at terminals have come to an end."

The public need for comprehensive port planning, is therefore, clear. If it be shown that that need can be satisfied only by governmental agencies, how can the Commissioner support a contention that such activity is "proprietary?"

Port development requires capital investment of enormous size. Accurate figures of the whole picture are not avail-

¹ The public need for port coordination is well set forth by Brysson Cunningham, Lecturer on Waterways, Harbours and Docks at University College, London, in "Port Administration and Operation" (p. 13):

[&]quot;There is, unquestionably, scope for a closer degree of cooperation between municipal, railway and port authorities and government departments in regard to the arrangement and working of the whole chain of operations connected with the reception and despatch of goods at the quayside. All are alike interested in the prosperity of the port, some perhaps indirectly, but none the less essentially, and the reaction of an unnecessary delay in the handling of cargo at the quayside will be felt ultimately by the ordinary citizen in an inflation of the prices of the commodities which he purchases in the shops. In the past, too little attention, unfortunately, has been paid to the matter."

able, but from a survey of the capital investments of the port bodies represented in the membership of the American Association of Port Authorities, we have no hesitation in stating that billions are involved.

Pecuniary profit cannot be derived from these investments. It is only government which is satisfied with the type of "profit", substantial as it is, which can be derived from these operations—the health, comfort and prosperity of the peoples of the State.

All authorities agree that only government can exert the regulatory efforts which such planning requires.

Thus, the authors of a treatise on the Port of Hamburg concluded:

"Three main considerations have always guided the State in the exercise of its authority in matters relating to the harbour, viz., (1) that berthing accommodation should be alloted impartially to all comers; (2) that the harbour facilities should be employed in conformity with their intended purposes, and (3) that they should be appropriately utilized in accordance with their respective capacities. Only a body not exclusively influenced in its decisions by business considerations could be expected to apply these guiding lines to actual practice."

Dr. MacElwee is equally positive in his conclusion that, because of diversity of interests, only governmental ef-

¹ Cunningham, "Port Administration and Operation", at page 4.

"The conditions under which ports in general have to work are such that, while they are unquestionably essential national assets, and freely recognised as such, they can very rarely make any remunerative return on the capital invested in them."

² "The Port of Hamburg" by L. Wendemuth and W. Böttcher, page 180.

fort can prevent the economic anarchy of an uncoordinated port. He says:

"The marine terminal problem is a national and not a private one. The railroads have been interested in reducing the costs of the ton-mile over their own road bed, but have had little concern with the expenses at the terminals because these expenses in the major part are paid by the shipper, and ultimately by the consumers. The same may be said of the steamship lines. The terminal problem is not in the way of being successfully settled by private interests. * * * The creation of a successful port requires large constructive action on the part of municipal, state, and national governments to guide and correlate, and even to compel conformity to a definite policy to be followed by all interests concerned." (Italics ours.)

And the record in the present cases bears out the difficulty of securing the cooperation of private interests in port development. The Assistant General Manager of the Port Authority testifying as to the lighterage problem in New York Harbor said (Record, folio 397-398):

"We have had the cooperation of the railroads in making fact-finding studies in almost every case, but there their cooperation has largely terminated, except in the case of the inland terminal. After we made this factual study of marine activities * * * we found tremendous savings, running into several millions of dollars. We submitted that study to the railroads in an effort to get them to cooperate by unifying or consolidating or pooling their marine activities and saving these millions of dollars in terminal expenses.

"We have found that the policy of the railroads is to unify such activities only to a very slight degree, and usually as more or less forced to do so by pressure of

public agencies."

^{1&}quot;Ports and Terminal Facilities", at page 2.

Major-General Lansing H. Beach, when Chief of Engineers of the United States Army, expressed the view of the Board of Engineers for Rivers and Harbors as follows:

"The belief of the Board is however, that the railroads should be compelled to divest themselves of their ownership of these port terminal properties, and that preferably they should pass to public ownership and control."

This Court itself has recognized the need for government supervision of port development, holding that attempted grants of waterfront property for purely private purposes are abdications of sovereign power and a derogation of the public trust in which the states hold these lands for the purpose of port development. In *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 452 (1892), the Court declared:

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objections can be made to the grants. * * * But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property." (Italics ours.)

¹ Paper on National Port Problems, Conference of the American Society of Civil Engineers, 1924, cited in Cunningham "Port Administration and Operation", at page 40.

Finally, how can the Commissioner of Internal Revenue urge that port development is not a function of State government, in the face of the following express declaration of Congress (40 Stat. 1286):

"It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned and regulated by the municipality or other public agency of the state and open to the use of all on equal terms." (Italics ours.)

and in the face of the War Department's declaration that:

"Whether by sufferance, or for convenience, or by necessity, the Congress and its agencies have refrained from occupying the field of port control in several directions. Indeed, it may be said, as a general proposition, that port administration is largely in the hands of local authorities rather than under Federal control."

As a matter of national policy, therefore, port development is peculiarly a function of State government. This national policy is recognized by the Circuit Court of Appeals in the Ten Eyck case, 76 F. (2d) 515, 517:

"Nor can the development of port or terminal facilities be classified solely as federal or private functions. There are many instances of State control or control under a state agency, and the statutes contemplate that the development of harbor and port facilities be mainly in the hands of the states. The federal government has encouraged the upbuilding of ports of the nation by the states themselves. Nothing enacted by Congress or done by the federal government indicates a desire to exclude or restrict state participation in carrying out

¹ United States War Department (Corps of Engineers), "Shore Control and Port Administration," 1923 page 136.

these projects which were desirable from the standpoint of state governments. On any broad consideration it may reasonably be considered as a usual governmental function of a state." (Italics ours.)

POINT III.

WHEREFORE, the American Association of Port Authorities joins in the prayer of the Respondents herein that the determination of the Circuit Court of Appeals herein be affirmed.

Respectfully submitted,

MARKELL C. BAER,
Attorney for the American
Association of Port Authorities.

Dated: March, 1938.

SUPREME COURT OF THE UNITED STATES.

Nos. 779, 780, 781.—Остовек Текм, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 779 vs.

Philip L. Gerhardt.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 780 vs.

Billings Wilson.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, . 781 vs.

John J. Mulcahy.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

23 [May **15**, 1938.]

Mr. Justice STONE delivered the opinion of the Court.

The question for decision is whether the imposition of a federal income tax for the calendar years 1932 and 1933 on salaries received by respondents, as employees of the Port of New York Authority, places an unconstitutional burden on the States of New York and New Jersey.

The Port Authority is a bi-state corporation, created by compact between New York and New Jersey, Laws of N. Y., 1921, c. 154; Laws of N. J., 1921, c. 151, approved by the Congress of the United States by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174. The compact authorized the Authority to acquire and operate "any terminal or transportation facility" within a specified district embracing the Port of New York and lying partially within each state. It directed the Authority to recommend a comprehensive plan for improving the port and facilitating its use, by the construction and operation of bridges, tunnels, terminals and other facilities. The Authority made such a recommendation in its re-

port of December, 1921, adopted by the two states in 1922. Laws of N. Y., 1922, c. 43; Laws of N. J., 1922, c. 9.

In conformity to the plan, and pursuant to further legislation of the two states, the Authority has constructed the Outerbridge Crossing Bridge, the Goethals Bridge, the Bayonne Bridge, and the George Washington Bridge, interstate vehicular bridges all passing over waters of the harbor or adjacent to it. It has also constructed the Holland Tunnel and the Lincoln Tunnel, interstate vehicular tunnels passing under the Hudson River. terprises were financed in large part by funds advanced by the two states and by the Port Authority's issue and sale of its bonds. In addition, the Authority operates an interstate bus line over the Goethals Bridge. It has erected and operates the Port Authority Commerce Building in New York City, which houses Inland Terminal No. 1, devoted to use as a freight terminal in connection with a plan to coordinate transportation facilities and reduce con-The terminal has no physical connection with any railroad facilities, dock or pier, but is used as a transfer terminal for interchange of freight brought by truck from and to the terminal and to and from eight railroad terminals.

The Port Authority collects tolls for the use of the bridges and tunnels, and derives income from the operation of the bus line and terminal building, but it has no stock and no stockholders, and is owned by no private persons or corporations. are all said to be operated in behalf of the two states and in the interests of the public, and none of its profits enure to the benefit of private persons. Its property and the bonds and other securities issued by it are exempt by statute from state taxation. Joint Resolution of Congress consenting to the comprehensive plan of port improvement, Pub. Res. No. 66, 67th Cong., H. J. Resolution No. 337, July 1, 1922, declares that the activities of the Port Authority under the plan "will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation." Statutes of New York and New Jersey relating to the various projects of the Port Authority declare that they are "in all respects for the benefit of the people of the two States, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance and operation and in carrying out the provisions of law relating to the said [bridges and tunnels] and shall be required to pay no taxes or assessments upon any of the property acquired by it for the construction, operation and maintenance of such" bridges and tunnels. Laws of N. J., 1925, c. 37, § 7; Laws of N. Y., 1925, c. 210, § 7; Laws of N. J., 1926, c. 6, § 7; Laws of N. Y., 1926, c. 761, § 7; Laws of N. J., 1927, c. 300, § 7; Laws of N. J., 1931, c. 4, § 14; Laws of N. Y., 1931, c. 47, § 14.

The respondents, during the taxable years in question, were respectively a construction engineer and two assistant general managers, employed by the Authority at annual salaries ranging between \$8,000 and \$15,000. All took oaths of office, although neither the compact nor the related statutes appear to have created any office to which any of the respondents were appointed, or defined their duties or prescribed that they should take an oath. The several respondents having failed to return their respective salaries as income for the taxable years in question, the commissioner determined deficiencies against them. The Board of Tax Appeals found that the Port Authority was engaged in the performance of a public function for the states of New York and New Jersey, and ruled that the compensation received by the Authority's employees was exempt from federal income tax. The Court of Appeals for the Second Circuit affirmed without opinion on the authority of Brush v. Commissioner, 85 F. (2d) 32, 300 U. S. 352; Commissioner v. Ten Eyck, 76 F. (2d) 515, and New York ex rel. Rogers v. Graves, 299 U. S. 401. We granted certiorari because of the public importance of the question presented. - U.S. -.

The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an implied limitation stems from *McCulloch* v. *Maryland*, 4 Wheat. 316, in which it was held that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, implied as an incident to the borrowing, taxing, war and other powers spe-

revid.

cifically granted to the national government by Article I, § 8 of the Constitution. It was held that Congress, having power to establish a bank by laws which, when enacted under the Constitution, are supreme, also had power to protect the bank by striking down state action impeding its operations; and it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the federal bank notes. 1 Cf. Osborn v. Bank of the United States, 9 Wheat. 738, 865-868.

In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on Afederal instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.2

state

¹ It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation. Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation. Congress may curtail an immunity which might otherwise be implied, Van Allen v. The Assessors, 3 Wall. 573, or enlarge it beyond the point where, Congress being silent, the Court would set its limits. Bank v. Supervisors, 7 Wall. 26, 30, 31; see Thomson v. Pacific Railroad, 9 Wall. 579, 588, 590; Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 581, and cases cited; James v. Dravo Contracting Co., 302 U. S. 134, 161.

The analysis is comparable where the question is whether federal corporate instrumentalities are immune from state judicial process. Federal Land Bank v. Priddy, 295 U. S. 229, 234-235.

^{2&}quot;The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their

It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities. Miller v. Milwaukee, 272 U. S. 713; cf. The Pacific Co., Ltd. v. Johnson, 285 U. S. 480, 493. But later cases have declared that federal instrumentalities are similarly immune from non-discriminatory state taxation—from the taxation of obligations of the United States as an interference with the borrowing power, Weston v. Charleston, 2 Pet. 449; and from a tax on "offices" levied upon the office of a captain of a revenue cutter. Dobbins v. Erie County, 16 Pet. 435.3

That the taxing power of the federal government is nevertheless subject to an implied restriction when applied to state instrumentalities was first decided in Collector v. Day, 11 Wall. 113,

representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme." Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 435-436.

3 In these cases, and particularly in Weston v. Charleston, 2 Pet. 449, as in McCulloch v. Maryland, emphasis was laid on the fact that by state action an impediment was laid upon the exercise of a power with respect to which the national government was supreme. In Weston v. Charleston, supra, Chief Justice Marshall said (pp. 465, 466):

"Can anything be more dangerous, or more injurious, than the admission

of a principle which authorizes every state and every corporation in the union which possesses the right of taxation, to burthen the exercise of this power

[the borrowing power] at their discretion?

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy." Compare Holmes, J., in Panhandle Oil Co. v. Knox, 277 U. S. 218, 223.

where the salary of a state officer, a probate judge, was held to be immune from federal income tax. The question there presented to the Court was not one of interference with a granted power in a field in which the federal government is supreme, but a limitation by implication upon the granted federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence.

The Court pointed out that the states were in existence as such entities when the Constitution was adopted: that the Constitution guaranteed to them a republican form of government and undertook to protect them from invasion and domestic violence; that it presupposes the continued existence of the states4 and their continued performance, free of inhibition by the national taxing power, of "the high and responsible duties assigned to them in the Constitution . . . And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it," the Court declared, "we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department . . . All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the

In 1871, when Collector v. Day was decided, the Court had not yet been called on to determine how far the Civil War Amendments had broadened the federal power at the expense of the states. The Slaughterhouse Cases, 16 Wall. 36, had not yet been decided, although they had already been once before the Court on motion for supersedeas, 10 Wall. 141. The fact that the taxing power had recently been used with destructive effect upon a state instrumentality, Veazie Bank v. Fenno, 8 Wall. 533, had suggested the possibility of similar attacks upon the existence of states themselves. Compare Lane County v. Oregon, 7 Wall. 71, 76-77; Slaughterhouse Cases, 16 Wall. 36. 82.

general government is found in that instrument." 11 Wall. 125,

We need not stop to inquire how far, as indicated in McCulloch v. Maryland, supra, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. It is enough for present purposes that the state immunity from the national taxing power, when recognized in Collector v. Day, supra, was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state "could long preserve its existence".

There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited. One, as was pointed out by Chief Justice Marshall in McCulloch v. Maryland, supra, 435-436, and Weston v. Charleston, supra, 465-466, is that the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

Another reason rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers. See Metcalf & Eddy v. Mitchell, 269 U. S. 514; cf. Thomson v. Pacific Railroad, 9 Wall. 579, 588, 590. With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was

adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend; to some extent not capable of precise measurement. to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. South Carolina v. United States, 199 U. S. 437, 454-455. Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.5

In tacit recognition of the limitation which the very nature of our federal system imposes on state immunity from taxation in order to avoid an ever expanding encroachment upon the federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in Collector v. Day, supra. It has been sustained where as in Collector v. Day, the function involved was one thought to be essential to the maintenance of a state government: as where the attempt was to tax income received from the investments of a municipal subdivision of a state, United States v. Railroad Co., 17 Wall. 322; to tax income received by a private investor from state bonds, and thus threaten impairment of the borrowing power of the state, Pollock v. Farmers' Land & Trust Co., 157 U. S. 429; cf. Weston v. Charleston, supra, 465-466; or to tax the manufacture and sale to a municipal corporation of equipment for its police force, Indian Motocycle Co. v. United States, 283 U.S. 570.

But the Court has refused to extend the immunity to a state conducted liquor business, South Carolina v. United States, supra; Ohio

⁵ Compare notes 1 and 2, supra.

v. Helvering, 292 U. S. 360, or to a street railway business taken over and operated by state officers as a means of effecting a local public policy. Helvering v. Powers, 293 U. S. 214. It has sustained the imposition of a federal excise tax laid on the privilege of exercising corporate franchises granted by a state to public service companies. Flint v. Stone Tracy Co., 220 U. S. 107, 157. In each of these cases it was pointed out that the state function affected was one which could be carried on by private enterprise, and that therefore it was not one without which a state could not continue to exist as a governmental entity. The immunity has been still more narrowly restricted in those cases where some part of the burden of a tax, collected not from a state treasury but from individual taxpayers, is said to be passed on to the state. In these cases the function has been either held or assumed to be of such a character that its performance by the state is immune from direct federal interference; yet the individuals who personally derived profit or compensation from their employment in carrying out the function were deemed to be subject to federal income tax.6

In a period marked by a constant expansion of government activities and the steady multiplication of the complexities of taxing systems, it is perhaps too much to expect that the judicial pronouncement marking the boundaries of state immunity should present a completely logical pattern. But they disclose no purposeful departure from, and indeed definitely establish, two guiding principles of limitation for holding the tax immunity of state

⁶ The following classes of taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state: Those who derive income or profits from their performance of state functions as independent engineering contractors, Metcalf & Eddy v. Mitchell, 269 U. S. 514, or from the resale of state bonds, Willcuts v. Bunn, 282 U. S. 216; those engaged as lesses of the state in producing oil from state lands, the royalties from which, payable to the state, are devoted to public purposes, Group No. 1 Oil Corporation v. Bass, 283 U. S. 279; Burnet v. Jergins Trust, 288 U. S. 508; No. 388, Bankline Oil Co. v. Commissioner, and No. 600, Helvering v. Mountain Producers Corp., both decided March 7, 1938, overruling Burnet v. Colorado Oil & Gas Co., 285 U. S. 393: Similarly federal taxation of property transferred at death to a state or one of its municipalities was upheld in Snyder v. Bettman, 190 U. S. 349, cf. Greiner v. Lewellyn, 258 U. S. 384; and a federal tax on the transportation of merchandise in performance of a contract to sell and deliver it to a county was sustained in Wheeler Lumber Bridge & Supply Co. v. United States, 281 U. S. 572; cf. Indian Motocycle Co. v. United States, 283 U. S. 570. A federal excise tax on corporations, measured by income, including interest received from state bonds, was upheld in Flint v. Stone Tracy Co., 220 U. S. 107, 162, et seq.; see National Life Insurance Co. v. United States, 277 U. S. 508, 527; compare the discussion in Educational Films Corp. v. Ward, 282 U. S. 379, 389, and in Pacific Co., Ltd. v. Johnson, 285 U. S. 480, 490.

instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. The state itself was taxed for the privilege of carrying on the liquor business in South Carolina v. United States, supra, and in Ohio v. Helvering. supra; and a tax on the income of a state officer engaged in the management of a state-owned corporation operating a street railroad was sustained in Helvering v. Powers, supra, because it was thought that the functions discouraged by these taxes were not indispensable to the maintenance of a state government. The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons. Metcalf & Eddy v. Mitchell. supra: Willcuts v. Bunn, 282 U. S. 216.

With these controlling principles in mind we turn to their application in the circumstances of the present case. The challenged taxes laid under § 22, Revenue Act of 1932, c. 209, 47 Stat. 169. 178, are upon the net income of respondents, derived from their employment in common occupations not shown to be different in their methods or duties from those of similar employees in private industry. The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government and are not beyond the reach of its taxing power. A non-discriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail

any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see *Indian Motocycle Co. v. United States, supra*, p. 581, footnote 1) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far.

The fact that the expenses of the state government might be less-ened if all those who deal with it were tax exempt was not thought to be an adequate basis for tax immunity in Metcalf & Eddy v. Mitchell, supra, in Group Na. 1 Oil Corp. v. Bass, 283 U. S. 279, in Burnet v. Jergins Trust, 288 U. S. 508; or in Helvering v. Mountain Producers Corp., No. 600, decided March 7, 1938.7 When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural. Willcuts v. Bunn, supra, 231. The extent to which salaries in business or professions whose standards of compensation are otherwise fixed by competitive conditions may be affected by the immunity of state employees from income tax is to a high degree conjectural.

The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional

⁷ Upon full consideration, the same principle was recently applied in James v. Dravo Contracting Co., 302 U. S. 134, although the limitation there was upon the immunity of the federal government.

immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

During the present term we have held that the compensation of a state employee paid from the state treasury for his service in liquidating an insolvent corporation, where the state was reimbursed from the corporate assets, was subject to income tax Mc-Loughlin v. Commissioner, No. 287, decided February 28, 1938. But. the Court has never ruled expressly on the precise question whether the Constitution grants immunity from federal income tax to the salaries of state employees performing, at the expense of the state. services of the character ordinarily carried on by private citizens. The Revenue Act of 1917, considered in Metcalf & Eddy v. Mitchell, supra, exempted the salaries of all state employees from income tax. But it was held in that case that neither the constitutional immunity nor the statutory exemption extended to independent contractors. In Brush v. Commissioner, supra, the applicable treasury regulation upon which the Government relied exempted from income tax the compensation of "state officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State". The sole contention of the Government was that the maintenance of the New York City water supply system was not an essential governmental function of the state. The Government did not attack the regulation. No contention was made by it or considered or decided by the Court that the burden of the tax on the state was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. If determination of that point was implicit in the decision it must be limited by what is now decided.

The pertinent provisions of the regulation applicable in the Brush case were continued in Regulations 77, Article 643, under the 1932 Revenue Act, until January 7, 1938, when they were amended to provide that "Compensation received for services rendered to a State is to be included in gross income unless the person receives such compensation from the State as an officer or employee thereof and such compensation is immune from taxation under the Constitution of the United States." The applicable provisions of § 116 of the 1932 Act do not authorize the exclusion from gross income of the salaries of employees of a state or a state-owned corporation. If the regulation be deemed to embrace the employees

of a state-owned corporation such as the Port Authority, it was unauthorized by the statute. But we think it plain that employees of the Port Authority are not employees of the state or a political subdivision of it within the meaning of the regulation as originally promulgated an additional reason why the regulation, even before the 1938 amendment, was ineffectual to exempt the salaries here involved.

• The reasoning upon which the decision in *Indian Motocycle Co.* v. *United States*, supra, was rested is not controlling here. Taxation of the sale to a state, which was thought sufficient to support the immunity there, is not now involved. Whether the actual effect upon the performance of the state function differed from that of the present tax we do not now inquire. Compare Wheeler Lumber Bridge & Supply Co. v. United States, 281 U. S. 572.

As was pointed out in *Metcalf & Eddy* v. *Mitchell*, supra, 524, there may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of government itself as to be considered beyond the reach of the federal taxing power. If the tax considered in *Collector* v. *Day*, supra, upon the salary of an officer engaged in the performance of an indispensable function of the state which cannot be delegated to private individuals, may be regarded as such an instance, that is not the case presented here.

Expressing no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government. So much of the burden of the tax laid upon respondents' income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government.

Reversed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.

. SUPREME COURT OF THE UNITED STATES.

Nos. 779, 780, 781.—OCTOBER TERM, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

779

275.

Philip L. Gerhardt.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 780

Billings Wilson.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

John J. Mulcahy.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 23, 1938.]

Mr. Justice BLACK, concurring.

I agree that this cause should be reversed for the reasons expressed in that part of the opinion just read pointing out that: respondents, though employees of the New York Port Authority, are citizens of the United States; the tax levied upon their incomes from the Authority is the same as that paid by other citizens receiving equal net incomes; and payment of this non-discriminatory income tax by respondents cannot impair or defeat in whole or in part the governmental operations of the State of New York. A citizen who receives his income from a State, owes the same obligation to the United States as other citizens who draw their salaries from private sources or the United States and pay Federal income taxes.

While I believe these reasons, without more, are adequate to support the tax, I find it difficult to reconcile this result with the principle announced in *Collector* v. *Day*, 11 Wall 113, and later decisions applying that principle. This leads me to the conclusion that we should review and reexamine the rule based upon *Collector* v. *Day*. That course would logically require the entire subject of in-

tergovernmental tax immunity to be reviewed in the light of the effect of the Sixteenth Amendment authorizing Congress to levy a tax on incomes "from whatever source derived"; and, in that event, the decisions interpreting the Amendment would also be reexamined.

From time to time, this Court has relied upon a doctrine evolved from Collector v. Day, under which incomes received from State activities thought by the Court to be non-essential are held taxable, while incomes from activities thought to be essential are held nontaxable. The opinion of the Court in this case refers to that doctrine. Application of this test has created "a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.'" Brush v. Commissioner, 300 U. S. 352, 365. Under this rule the tax status of every State employee remains uncertain until this Court passes upon the classification of his particular employment. The result is a confusion in the field of intergovernmental tax immunity which I believe could be clarified by complete review of the subject. Testing taxability by judicial determination that State governmental functions are essential or non-essential, contributes much to the existing confusion. I believe the present case affords occasion for appropriate and necessary abandonment of such a test, particularly since recent decisions2 have already substantially advanced toward a reexamination of the doctrine of intergovernmental immunity.

The present controversy illustrates the necessity for further reexamination. New York created the Port Authority with power to engage in activities which that State believed to be essential. Yet, under this test, New York's determination is not final until reviewed in a tax litigation between the government and a single citizen.

Conceptions of "essential governmental functions" vary with individual philosophies. Some believe that "essential governmental functions" include ownership and operation of water plants, power and transportation systems, etc. Others deny that such

¹ See, Brushaber v. Union Pacific R. R. Co., 240 U. S. 1; Peck & Co. v. Lowe, 247 U. S. 165, 172; Eisner v. Macomber, 252 U. S. 189; Evans v. Gore, 253 U. S. 245.

² See, James v. The Dravo Contracting Co., 302 U. S. —; Helvering v. Bankline Oil Co., 302 U. S. —; Helvering v. Mountain Producers Corp., 302 U. S. — (overruling Gillespie v. Oklahoma, 257 U. S. 501 and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393).

ownership and operation could ever be "essential governmental functions" on the ground that such functions "could be carried on by private enterprise." A Federal income tax levied against the manager of the state-operated elevated railway company of Boston was sustained even though this manager was a public officer appointed by the Governor of Massachusetts "with the advice and consent of the council." On the other hand, the Federal government was denied—although with strong dissent—the right to collect an income tax from the chief engineer in charge of New York City's municipally owned water supply. An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the "essential" and "non-essential" test.

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

Surely, the Constitution contains no imperative mandate that public employees—or others—drawing equal salaries (income) should be divided into taxpaying and non-taxpaying groups. Ordinarily such a result is discrimination. Uniform taxation upon those equally able to bear their fair shares of the burdens of government is the objective of every just government. The language of the Sixteenth Amendment empowering Congress to "collect taxes on incomes from whatever source derived"—given its most obvious meaning—is broad enough to accomplish this purpose.

³ Helvering v. Powers, 293 U. S. 214, 222, 223.

⁴ Brush v. Commissioner, 300 U. S. 352; cf., Metcalf & Eddy v. Mitchell, 269 U. S. 514.

SUPREME COURT OF THE UNITED STATES.

Nos. 779, 780, 781.—OCTOBER TERM, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 779

Philip L. Gerhardt.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 780 vs.

Billings Wilson.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 781

John J. Mulcahy.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 23, 1938.]

Mr. Justice Butler, dissenting.

So far as concerns liability for federal income tax, the salaries paid by the Port Authority to its officers and employees are not distinguishable from salaries paid by States to their officers and employees. The judgment of the Circuit Court of Appeals should therefore be affirmed on the principle applied in M'Culloch v. Maryland (1819) 4 Wheat. 316, that under the Constitution States are without power to tax instrumentalities of the United States and in The Collector v. Day (1871) 11 Wall. 113, that the United States is without power to tax the salary of a state officer. That principle has been followed in a long line of decisions. In Indian Motocycle Co. v. United States (1931) '283 U. S. 570, we held the United States without power to tax the sale of a motorcycle to a municipal corporation for use in its police service. The Court, speaking through Mr. Justice Van Devanter, said (p. 575):

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch v. Maryland, 4 Wheat. 316, 430; United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 327; Johnson v. Maryland, 254 U. S. 51, 55-56; Gillespie v. Oklahoma, 257 U. S. 501, 505; Crandall v. Nevada, 6 Wall. 35, 44-46."

Following that case, we recently applied the principle in N. Y. ex rel. Rogers v. Graves (January 4, 1937) 299 U. S. 401, to prevent the State of New York from taxing the salary of counsel of the Panama Railway Company, a federal instrumentality, and in Brush v. Commissioner (March 15, 1937) 300 U. S. 352, to prevent the United States from taxing the salary of the chief engineer of the bureau of water supply for the city of New York. In Helvering v. Therrell (February 28, 1938) — U. S. —, holding that the federal government has power to tax compensation paid to attorneys and others out of corporate assets for necessary services rendered about the liquidation of insolvent corporations by state officers proceeding under her statutes, we said (p. —):

"Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

The Court, seemingly admitting that it would be futile to attempt to distinguish the cases now before us from the Brush case, overrules it by declaring that it must be limited by what is now decided. The Solicitor General did not in any manner raise the point on which the Court puts this decision. He sought reversal on the grounds that the Port Authority's activities are proprietary in nature; that it is not an agency created by the States alone; that it operates in interstate commerce subject to the paramount

power of Congress. Indeed, he expressly disclaimed intention to ask re-examination of the doctrine of immunity on which the Brush case rests. In substance, as well as in the language used, the decision just announced substitutes for that doctrine the proposition that, although the federal tax may increase cost of state governments, it may be imposed if it does not curtail functions essential to their existence. Expressly or sub silentio, it overrules a century of precedents. Cf. James v. Dravo Contracting Co. (December 6, 1937) 302 U. S. 134, 152, 161; Helvering v. Mountain Producers Corporation (March 7, 1938) — U. S. —, —, — (82 L. Ed. 607, 613, 615). As they stood when the cases now before us were in the Circuit Court of Appeals, our decisions required it to hold that the salaries paid by the Port Authority to respondents are not subject to federal taxation. I would affirm its judgments.

Mr. Justice McReynolds concurs in this opinion.